(1)

No. 04 - 8 - JUN 2 9 2004

IN THE

Supreme Court of the United States

NEVILLE CHEMICAL COMPANY,

Petitioner,

v.

STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the decision of which Petitioner Neville Chemical seeks review, the Ninth Circuit Court of Appeals ruled that the six-year statute of limitations for a CERCLA remedial action runs from the date a government entity grants "final" approval of a remediation plan. In doing so, the Court of Appeals ignored the language of the statute and authority from other circuits, and granted government entities unfettered power to choose when, or whether, the statute begins running by choosing when, or whether, to issue that final approval. Petitioner Neville Chemical therefore requests that this Court issue a writ of *certiorari* to address the following question:

Whether the six-year statute of limitations for CERCLA remedial actions appearing in 42 U.S.C. § 9613(g)(2) runs from the date on which construction of remedial facilities begins, or the date on which the responsible government entity grants approval of a final remedial plan.

STATEMENT PURSUANT TO RULE 29.6

Neville Chemical Company was incorporated in the State of Pennsylvania in 1925. The stock of Neville Chemical Company is privately held and not offered for public sale. Neville Chemical Company has two foreign affiliates, Neville Chemical Europe B.V. of Uithoorn, Holland, and ND Dispersions LLC, a joint venture with Les Derives Resiniques et Terpeniques of Landes, France.

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Neville Chemical Company respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Appendix A, pp. 1a-26a) is reported at 358 F.3d 661. The decisions of the District Court (Central District of California) are unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 10, 2004. The Court of Appeals denied Neville Chemical's petition for rehearing on March 31, 2004. (Appendix I, pp. 136a-137a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act provides that suit for costs incurred in a "remedial action" must be commenced "within 6 years after initiation of physical on-site construction of the remedial action . . ." (42 U.S.C. § 9613(g)(2).)

STATEMENT OF THE CASE

The California Department of Toxic Substances Control ("The DTSC") filed suit against Petitioner Neville Chemical Company on September 21, 2000 in United States District Court for the Central District of California. The DTSC sued pursuant to 42 U.S.C. § 9607 to recover response costs for

remediation of groundwater contamination at a site in Santa Fee Springs, California. The District Court denied Neville Chemical's motion for summary judgment brought, in part, *based on the DTSC's failure to file suit* within six years of Neville Chemical's commencement of construction of remedial facilities, granting the DTSC's cross-motion for summary judgment and entering judgment in the DTSC's favor. The Court of Appeals affirmed, ruling that, regardless of when Neville Chemical began construction of remedial facilities, the statute of limitations could not begin running unless and until the DTSC formally approved the final remedial plan.

A. Neville Chemical Complies With DTSC Instructions And Begins Remediation At The Santa Fe Springs Site

From 1952 to 1987, Neville Chemical manufactured chemicals at a site in Santa Fe Springs, California. (App. 2a.) On December 10, 1986, the DTSC issued a Remedial Action Order under California's Health & Safety Code. (App. 2a-3a.) The order required Neville Chemical to perform a remedial investigation and feasibility study and prepare a remedial action proposal. (*Id.*) Once the DTSC approved Neville Chemical's proposed remedial action, Neville was required to execute the plan until the clean-up goals were achieved. (*Id.*)

Neville Chemical submitted the results of its investigation in August 1991 and, on October 25, 1991, the DTSC ordered Neville Chemical to prepare its "Remedial Action Plan" for clean-up of the Santa Fe Springs site:

> In order to expedite planning for groundwater remediation at [Neville Chemical], the Department

> is hereby directing [Neville Chemical] to prepare and submit an RA proposal which includes, at a minimum the following items:
>
> > The specific objectives of the extraction/ treatment system.
> >
> > Proposed locations, dimensions, and construction details for groundwater extraction wells.
> >
> > Technical description of selected groundwater treatment technologies including a general discussion of selection criteria, an evaluation of cost effectiveness and, *if necessary*, a focused feasibility study . . .

The order specifically directed that Neville Chemical's proposal "be consistent with a *final* cleanup strategy for groundwater as it may ultimately become the final remedy presented in the Remedial Action Plan. The DTSC also instructed Neville Chemical to begin remediation as soon as possible:

> The most recent schedule for cleanup of the [Neville Chemical] site estimates that the draft Remedial Action Plan (RAP) will not be completed until January 1993. It is not unreasonable to assume that an additional six months to a year will pass before the final [Remedial Action Plan] is approved and a remedial design for groundwater is ready for implementation. Proceeding immediately with

> plans to extract and treat groundwater should substantially expedite remediation of groundwater contamination and thereby limit damage to potential groundwater resources. This should result in a more timely and cost effective cleanup.

Thus, as of October 1991, both the DTSC and Neville Chemical were working on the assumption that investigation was essentially complete, that the plan Neville Chemical would submit in January 1993 would be for *remedial* action rather than "removal" (as those terms are used in CERCLA), and that extraction and treatment of the groundwater should commence as soon as possible, regardless of when a final remediation action plan would be approved.

Neville Chemical submitted its proposal for remediation of groundwater contamination in a report dated September 1, 1992. (App. 4a.) The proposal was based on three extraction wells by which groundwater would be brought to the surface, treated for hazardous waste, and discharged into the sanitary sewer system. (App. 126a.) As directed by the DTSC, the proposal set forth the design and plan for implementation of an extraction well network and water treatment system that would serve as the final groundwater remedy for the Santa Fe Springs site. (*Id.*)

The DTSC approved Neville's September 1, 1991 proposal in January 1993. (App. 4a.) With the DTSC's approval, Neville Chemical's contractors installed groundwater extraction wells on April 20, 22 and 26, 1994. (App. 4a-5a.)

Following the DTSC's approval of Neville Chemical's proposal to begin remediation at the Santa Fe Springs site

(by construction of the extraction wells), the DTSC continued touching the regulatory and administrative bases required before approval of a "final" remedial action plan. (App. 4a-6a.) It elicited a feasibility study from Neville which it received and approved in December 1994. (*Id.*) It reviewed the alternatives which Neville examined in the feasibility study, and elicited and examined yet *another* analysis of possible remedies. (*Id.*) On March 16, 1995, the DTSC approved Neville Chemical's draft remedial action plan and circulated it for public comment. App. 6a.) (*Id.*)

The draft remedial action plan was composed in principal part of extraction and treatment of groundwater by the wells and other facilities installed beginning in April 1994. The DTSC finally approved the final remedial action plan on May 8, 1995. By then, the extraction wells had been in place for thirteen months.

The long regulatory and administrative process and the final remedial action plan are remarkable for one consistent fact: except for "do nothing" solutions such as use restrictions or *in situ* treatment, every single alternative considered by the DTSC and Neville was based on the extraction wells that Neville Chemical installed in April 1994.

B. The District Court's Denial Of Neville Chemicals' Motion For Summary Judgment And Entry Of Judgment In Favor Of The DTSC

On September 21, 2000, the DTSC filed the instant lawsuit against Neville Chemical (*State of California v. Neville Chemical Company,* U.S.D.C., C.D. Cal., Docket No. 00-CV-10205 GHK), seeking reimbursement of costs the DTSC claimed to have incurred in "supervising" the

contamination that it had directed Neville Chemical to investigate and remediate, and which Neville Chemical had in fact investigated and was in fact remediating. The DTSC complaint named only Neville Chemical as a defendant, and alleged two causes of action under CERCLA, one for reimbursement and one for declaratory relief regarding Neville's purported duty of reimbursement. (*Id.*)

On October 22, 2001, Neville Chemical filed a motion for summary judgment based on the DTSC's failure to file suit within six years of Neville Chemical's initiation of on-site construction of remedial facilities on the Santa Fe Springs property. The District Court denied Neville Chemical's motion on December 18, 2001:

> [P]laintiff has presented admissible evidence that diverse solutions to the groundwater contamination problem were still being discussed in [Neville's] draft [feasibility study] in December 1994, and that the parties were still considering changes in the groundwater plan up until the [remedial action plan] was finalized in May 1995. Plaintiff has also offered evidence that the DTSC, at least as late as its October 6, 1994 letter to [Neville Chemical], was insisting that further sampling and monitoring was necessary before the wells proposed . . . could be considered the final remedial solution for groundwater at the site. Therefore, viewing the evidence in the light most favorable to plaintiff, the nonmoving party, the Court finds that the final remedial design was not in place, and the statute of limitations had not yet begun to accrue, on September 21, 1994 [*i.e.* six years before the complaint was filed]. (App. 134a-135a, footnote omitted.)

The District Court thereafter granted the DTSC's motions for partial summary judgment and judgment on the pleadings, ultimately entering judgment for the DTSC on July 31, 2002.

C. The Ninth Circuit Court Of Appeals' Published Decision

Neville Chemical appealed the District Court's decision to the Ninth Circuit Court of Appeals. On February 10, 2004, the Court of Appeals issued a published decision affirming the District Court judgment, holding that Neville Chemical's construction of the remedial facilities in May 1994 did not commence the statute of limitations running because the DTSC had not yet issued a "final" approval of the remedial plan. (App. 11a-14a.)

> [W]e conclude that the 'initiation of physical on-site construction of the remedial action' can only occur after the final remedial action plan is adopted, and that, in this case, the statute of limitations, therefore, could not have begun to run until the final remedial action was approved on May 8, 1995. (App. 19a-20a.)

The Court of Appeals denied rehearing on March 31, 2004.

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY WRIT OF CERTIORARI

The Court should exercise its authority to review the Court of Appeals' published decision because the decision conflicts both with the rulings of Courts in other Circuits and with the plain language of the statute of limitations. The rule embraced by the Court of Appeals also grants government entities unlimited discretion as to when, or even whether, the statute of limitations begins running, in derogation both of a settled principle of law and the legislative policy underlying the statute of limitations itself.

A. The Court Of Appeals' Decision Cannot be Reconciled With The Language Of The Statute Or Decisions Of Other Courts

1. *On Its Face, The Statute Of Limitations Bars The DTSC's Lawsuit*

The Ninth Circuit's decision cannot be reconciled with the plain language of the statute because its focuses on an event on which the statute is mute ("final" approval of the remediation plan) and renders irrelevant the event on which the statute speaks (construction of remedial facilities). The CERCLA statute of limitations for a remedial action states that it begins running when construction begins on remedial facilities. (42 U.S.C. § 9613(g)(2).) The Court of Appeals published a decision that essentially states that the date of construction is irrelevant. (App. 11a-14a.) Instead,

the Court of Appeals ruled, the relevant date is whenever the government entity (in this case, the California DTSC) grants "final approval" of the remedial plan.

As the Court of Appeals' decision notes, the facts relevant to apply the statute of limitations are not at issue. (App. 7a.) The DTSC ordered Neville Chemical to prepare a remedial plan for the Santa Fe Springs site "consistent with a final cleanup strategy"; in September 1992, Neville Chemical proposed a plan which consisted, in principal part, of three extraction wells and a treatment facility; in January 1993, the DTSC ordered Neville Chemical to begin construction of the three wells and treatment facility proposed in Neville Chemical's draft remedial plan pending final approval; Neville Chemical began this construction by installing the wells in April 1994; the DTSC issued a "final" approval on May 8, 1995 of a remedial plan that consisted, in principal part, of the same three extraction wells and treatment facility whose construction began in April 1994; and the DTSC filed suit on September 21, 2000.

On its face, the statute of limitations would appear to bar the DTSC's action. The DTSC's suit was an action for recovery of remedial costs based entirely on 42 U.S.C. § 9607. CERCLA prescribes a six-year statute of limitations for remedial actions, stating that the six-year period begins to run when construction of remedial facilities begins:

> Actions for recovery of costs
>
> An initial action for the recovery of costs referred to in section 9607 of the title must be commenced . . .

> (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph . . . (42 U.S.C. § 9613(g)(2).)

Neville Chemical performed the first construction of the remedial facilities in April 1994, when it installed the three extraction wells. The DTSC did not file suit until September 2000. Application of the six-year statute of limitations should have been clear.

2. *Prior Decisional Authority Supports Applying The Statute Of Limitations To Bar The DTSC's Suit*

In addition to the plain language of the statute, the Ninth Circuit's decision is inconsistent with rulings from courts in other circuits. Indeed, prior decisional authority has not hesitated to follow the plain language of the statute and reject "bright line" rules dating the statute from "final" approval. (*United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702, 712 (7th Cir. 1998); *see also United States v. Atlantic Richfield*, 147 F. Supp. 2d 614, 620 (So. D. Tex. 2001); *Louisiana v. Braselman Corp.*, 78 F. Supp. 2d 543, 548 (E.D. La. 1996); *cf. Gherarty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 926 (5th Cir. 2000).)

In *Navistar*, the United States sued a property owner to recover the costs of responding to the presence of hazardous waste in a landfill on its property. (*Navistar*, *supra*, 152 F.3d at 704.) The remedial plan called, in part, for the placement

of a clay "cap" over much of the landfill. (*Id.* at 705.) The U.S. filed its costs recovery suit six years *less* one day after the remedial plan was approved in writing, but six years *plus* one day after the property owner began placing clay on the property. (*Id.*)

The District Court denied the defendant's motion for summary judgment, but the Seventh Circuit reversed. It noted that the United States Supreme Court has instructed lower courts not to enforce statutes of limitations "in a grudging, hostile fashion . . ." (*Id.* at 707.) The Seventh Circuit went on to acknowledge the settled principle that statutes of limitations are enacted for a reason, and concluded by reversing the denial of summary judgment, ruling as a matter of law that the commencement of the remedial activity *one day* more than six years before suit was filed barred the government's recovery. (*Id.* at 711, *et seq.*)

The Ninth Circuit's decision cannot be reconciled with *Navistar*. In *Navistar*, the Seventh Circuit rejected use of the "final" approval date to start the statute of limitations running. In this action, the Ninth Circuit's published decision *embraces* using the "final" approval, essentially rendering the statute's reference to construction meaningless. If anything, the facts of this case are more compelling than in *Navistar*, where it turned out that the remedy on which the property owner embarked required substantial revision and reconstruction. (*Id.* at 705-706.) By contrast, in this case, the three extraction wells that Neville Chemical installed in April 1994 formed the heart of the remedial plan ultimately approved by the DTSC.

Ironically, the Seventh Circuit's decision in *Navistar* decision followed a 1995 ruling from a *California* District Court which rejected a "bright-line" rule that the date on which "final" approval of a remedial plan issued was the date on which the statute of limitations begins to run. (*California v. Hyampom Lumber Co.*, 903 F. Supp. 1389, 1392-1393 (E.D. Cal. 1995.) In *Hyampom Lumber*, the DTSC filed suit to recover costs from property owners which the DTSC claimed to have incurred in responding to contamination on the owner's property. (*Id.* at 1390.) The DTSC issued a draft remedial action plan in June 1988 that required the property owners to excavate and remove contaminated soil. (*Id.*) Beginning on September 15, 1988, a subcontractor installed a lumber pole and necessary hardware to run power and water onto the site. (*Id.* at 1391.)

When the DTSC filed suit to recover its response costs, the defendants moved for summary judgment, arguing that construction of facilities necessary for the remedial action (a power pole and some wire and pipes) had begun the six-year statute of limitations running. (*Id.* at 1391.) Although the power lines and water pipes had been installed in September 1988, the DTSC approved the remedial action plan in October 1988, with on-site excavation beginning on October 24, 1988. The DTSC did not file suit to recover its costs in the remedial action until September 30, 1994. (*Id.*)

The District Court began its analysis by quoting the statute of limitations, which states that it begins running with "initiation of physical on-site construction of the remedial action . . ." (42 U.S.C. § 9613(g)(2)(B).) The Court noted that this language actually contained four elements: 1) the construction at issue must be "physical"; 2) it must

have occurred "on-site"; 3) it must be part of the "construction of remedial action"; and 4) it must constitute the "initiation" of the remedial action. (*Hyampom Lumber*, *supra*, 903 F. Supp. 1389.) The Court found that the first two elements had surely been satisfied. Installation of the pole and some wires and pipes had surely been "physical" and "on-site." (*Id.*)

The Court stated that whether this was "construction of the remedial action," was a more difficult question. The Court stated that this third element actually had two of its own sub-elements: the activity must be "remedial" and part of the "construction of the remedial action." The Court concluded that the activity in question – installing the pole, some wire and pipes – satisfied this element because it was "consistent with the permanent remedy." (*Id.*)

Significantly, in analyzing whether the construction at issue started the statute of limitations running, the Court in *Hyampom* rejected the notion that the absence of a final remediation plan meant that the construction could not be "initiation" of that plan . (*Id.* at 1392-1393.) To the contrary, the Court stated, any such rule "would make the lengthy definition of "remedy" and "remedial action" appearing in [42 U.S.C.] § 9601(24) meaningless – the terms would simply be defined as all response activities which occur after final approval of the permanent plan." (*Id.*, *see* App. 138a-139a.)

The Court concluded that the statute of limitations began running when the pole and some wire and pipes were installed beginning on September 15, 1988. (*Id.* at 1394.) Thus, the State's filing of its contribution suit on September 30, 1994 was two weeks late. (*Id.*)

As with *Navistar*, this case presents an even more compelling case for enforcing the statute of limitations than *Hyampom Lumber*. In *Hyampom*, the initial construction was hardly unique to remedial action; it essentially consisted of running power to the job site. (*Id.* at 1391.) By contrast, the three extraction wells installed by Neville Chemical are unique to remediation of groundwater treatment.

In addition to the Seventh Circuit (the *Navistar* decision), District Courts in the Fifth Circuit also followed the *Hyampom Lumber* decision and rejected use of the "final" approval to begin the statute of limitations running. (*See United States v. Atlantic Richfield*, *supra*, 147 F. Supp. 2d 614, 620 (So. D. Tex. 2001); *Louisiana v. Braselman Corp.*, *supra*, 78 F. Supp. 2d 543, 548 (E.D. La. 1996).)

The Ninth Circuit's decision dates the statute of limitations from an event – final approval of the remedial plan – which the statute of limitations never mentions. In doing so, the decision ignores CERCLA's statutory focus on initiation of construction and conflicts with decisions of other courts. Neville Chemical respectfully submits that these conflicts merit this Court's intervention through the extraordinary writ of *certiorari*.

B. The Ninth Circuit Decision Impermissibly Gives The Government Control Over When, Or Even Whether, The Statute Of Limitations Will Run

In addition to the conflict with other courts, the Ninth Circuit decision merits this Court's review because it gives government entities unfettered discretion over when, or even whether, the CERCLA statute of limitations begins to run. The Ninth Circuit decision states that, unless and until

a "final" approval of the remedial plan issues, the statute of limitations does not begin running. It follows that a government entity such as California's DTSC can delay or even *prevent* commencement of the statute of limitations by the simple expedient of declining to issue final approval of a remedial plan, notwithstanding that the remedial activities have long been under way.

Federal Courts do not approve endowing any parties, much less state agencies, with unlimited discretion regarding when or whether a statute of limitations operates. (*United States v. Cocoa Berkau, Inc.*, 990 F.2d 610, 614 (Fed. Cir. 1993) [court cannot interpret the accrual of a right of action such that it "permits a single party to postpone unilaterally and indefinitely the running of the statute of limitations."]; *see also United States v. Therm-All, Inc.*, 352 F.3d 924 (5th Cir. 2003); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning*, 228 F.3d 998, 1001 and n.2 (Kosinski, J., dissenting).) To the contrary, Federal Courts have implicitly recognized the impropriety of permitting a government entity to delay the running of a statute of limitations indefinitely. (*United States v. Vanornum*, 912 F.2d 1023, 1027 n.5 (8th Cir. 1990), citing *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 453 (D.C. Cir. 1972).)

The principle that the government is not entitled to delay statutes of limitations forever also accords with the legislative purpose underlying the CERCLA statute of limitations itself:

> By implementing the [CERCLA] statute of limitations, [Congress] expressed a determination that, in order to achieve timely clean-up of affected sites and to ensure replenishment of the [Superfund], cost recovery actions must commence in a timely fashion. Therefore, although we shall construe

> *ambiguities* in the statute in favor of the government in an effort to avoid frustrating the beneficial purposes of CERCLA, we must recognize that Congress has determined that that those beneficial purposes are serviced by the timely filing of recovery actions." (*Navistar*, *supra*, 152 F.3d at 707-708, emphasis added, footnotes omitted.)

The Ninth Circuit decision's embrace of a "bright line" rule running the statute of limitations from issuance of a "final" approval permits a government entity to determine when, or whether, the statute runs by choosing when, or wither, to issue final approval of the remediation plan. The decision is therefore in derogation, not merely of a settled principle of Federal law, but of the legislative purpose underlying the statute the decision applied. Review of the decision is an appropriate use of this Court's powers.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *STATE OF CALIFORNIA v. NELVILLE CHEMICAL COMPANY* (NINTH CIRCUIT DOCKET NO. 02-56506 FILED FEBRUARY 10, 2004)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-56506

D.C. No.
CV-00-10205-CAS

STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,

Plaintiff-Appellee,

v.

NEVILLE CHEMICAL COMPANY, a corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of California
Christina A. Snyder, District Judge, Presiding

Argued and Submitted
November 3, 2003—Pasadena, California

Filed February 10, 2004

Before: Harry Pregerson, Ferdinand F. Fernandez, and Marsha S. Berzon, Circuit Judges.

Before Harry Pregerson, Ferdinand F. Fernandez, and Marsha S. Berzon, Circuit Judges.

Appendix A

OPINION

BERZON, Circuit Judge:

The issue before us presents a question of statutory interpretation: Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), when does the limitations period for suing to collect remedial action costs from a party responsible for hazardous substances begin? One would expect a fairly straightforward answer to that question in the statute. Potential plaintiffs need to know when to file suit, and potential defendants would surely prefer clear notice as to when their legal liability, if any, lapses. True, in the "maze"-like structure and "baffling language" of CERCLA, clarity is rare. *Carson Harbor Vill. Ltd. v. Unocal Corp.*, 270 F.3d 863, 880, 883 (9th Cir.2001) (en banc). The provision we grapple with today appears at first blush to be no exception. But as one works one's way through the statute as a whole, a fairly definite answer emerges. As will appear, we conclude that the limitations period for bringing an initial suit for recovery of remedial action costs under CERCLA cannot accrue until after the final adoption of the remedial action plan required by the statute.

FACTUAL BACKGROUND

For 35 years, Neville Chemical Company (Neville) manufactured at its industrial facility in Santa Fe Springs, California, various chemical compounds for use in insecticides, solvents, metal working lubricants, and flame retardants. These activities contaminated the groundwater and soil at the facility. In 1986, the California Department of

Toxic Substances Control[1] (the Department) issued a Remedial Action Order, directing Neville to (1) begin the process of cleaning the site; (2) conduct a remedial investigation and feasibility study; (3) submit a draft remedial action plan (RAP); and, once the draft RAP was finalized, (4) implement the plan.

The Department sent Neville a letter on September 29, 1989, informing Neville of its obligation to pay an "activity fee" to the Department. The letter explained that the activity fee—$46,636.38—was "to partially cover the Department's cost of overseeing [Neville's] actions to characterize and satisfactorily remediate this site." At that time, the Department had a formal policy of "only collect[ing] direct program expenditures (generally laboratory or contract expenditures) beyond activity fees in cases where the responsible parties are being cooperative." In 1992, the Department rescinded this policy in favor of pursuing the full cost recovery of overseeing a clean-up, regardless of whether the responsible party was recalcitrant or cooperative.

In August 1991, Neville presented the Department with preliminary findings from the Remedial Investigation. In October 1991, the Department directed Neville to prepare a Groundwater Removal Action Proposal (the Proposal), in which Neville was to propose an expedited response to the contamination. The Department stated that the Proposal "should be consistent with a final cleanup strategy for

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1. The Department of Toxic Substances Control was a division of the California Department of Health Services until it became a separate department in 1991. We will refer to this entity simply as "the Department" throughout this opinion.

groundwater as it may ultimately become the final remedy presented in the Remedial Action Plan." Neville submitted its Proposal on September 1, 1992. It included "three major components: an extraction system, a temporary on-site treatment system, and an effluent disposal system."

The Department reviewed the Proposal and, in January 1993, directed Neville to implement the extraction and treatment system. In a letter to Neville, the Department stated: "The proposed system will potentially become part of the final remedial alternative for the site," and "[t]he ground water extraction and treatment system is envisioned as part of the final remedial alternative. . . . [H]owever, the Department may order the discontinuation of its use in the event it is not effective or if it enhances the migration of contaminants from the Site."

Neville submitted a Feasibility Study Technical Memorandum in August 1993, listing alternative possible remedies. In response to this memorandum, the Department stated that it:

> has not gathered sufficient information and public comment to require any of the alternatives to be implemented as of yet. Part of this remediation process requires that all feasible alternatives be scrutinized carefully and thoroughly prior to actual selection of the remedial alternative. The Feasibility Study is the tool that allows the Department to weigh the technical and substantial issues for all possible alternatives in order to make a sound and fair decision in protecting the public health and the environment.

Additionally, the letter stated:

> The department reviewed and approved of the [Groundwater] Removal Action as an interim measure to prevent further migration and to protect the public health and the environment. The [Groundwater] Removal Action is not a Department-approved final Remedial Action, and cannot be construed to be such. The [Groundwater] Removal Action, may be included as part of the final Remedial Action depending on the results and conclusions of the Health Risk Assessment and the Remedial Action itself, which has yet to be prepared. Therefore, whether the [Groundwater] Removal Action constitutes the groundwater portion of the final Remedial Action cannot be determined at this point.

Neville began to excavate three extraction wells at the site in April 1994. A month later, Neville submitted a Draft Feasibility Study, again proposing several alternative remedies. The Department responded with comments to this draft in June of 1994, including the following: "The Department has never stated that the Ground Water Removal Activity . . . is the final ground water remedy, but has to be tested to determine the efficiency of the system." In October of the same year, the Department sent Neville a letter expressing concern because Neville had not started construction of the Groundwater Removal System. The Department also noted, "Neville will need to compare several sample results to determine the effectiveness of the System. Neville will use the information to determine whether this

or a modified System will be incorporated into the draft Remedial Action Plan."

Neville submitted a final Feasibility Study, discussing seven alternative groundwater remedial options, in December of 1994. Later that month the Department approved it. Neville then submitted a draft remedial action plan. On May 8, 1995, after having circulated the draft for public review and comment and holding a public meeting to discuss the plan, the Department approved the final remedial action plan. The groundwater containment and treatment system originally designed as an interim removal action remained part of the final RAP.

ANALYSIS

I. *Accrual of Cause of Action*

Neville first argues that the district court erred in denying Neville's summary judgment motion because the statute of limitations for bringing a cost recovery action under CERCLA barred California's suit. A party may appeal a denial of summary judgment once a final judgment has been entered in the suit. *Comsource Indep. Foodservice Cos. v. Union Pac. R.R. Co.*, 102 F.3d 438, 442 (9th Cir.1996). We review a denial of summary judgment de novo. *Id.* (citing *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), and *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1290 (9th Cir.1982)).

California brought suit on behalf of the Department under § 107 of CERCLA, 42 U.S.C. § 9607. This statute provides

that the owner and operator of a facility "shall be held liable for—(A) all costs of removal or remedial action incurred by . . . a State . . . not inconsistent with the national contingency plan. . . ." An "initial action"[2] for recovery of costs "must be commenced . . . for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action." 42 U.S.C. § 9613(g)(2). The present suit was brought on September 21, 2000. Therefore, the suit is time-barred if and only if the "initiation of physical on-site construction of the remedial action" occurred on or before September 21, 1994.

The facts of the case are not in dispute. The only question is which of the enumerated events constitutes the "initiation of physical on-site construction of the remedial action," thereby triggering the limitations period. Neville maintains that the statute of limitations began to run in April 1994, when it started excavating the extraction wells. California argues that no remedial action could have occurred until the final remedial action plan was approved by the Department on May 8, 1995. This Court has yet to decide when an action is remedial for the purpose of triggering the statute of limitations in cost recovery suits under 42 U.S.C. § 9613(g)(2).

A. *Statutory Interpretation*

The purpose of a limitations period is to "clearly define the time period in which suit must be commenced."

2. The statute divides actions for recovery of costs into initial and subsequent. The parties do not dispute that this is an "initial action."

United States v. Colvin, 204 F.3d 1221, 1226 (9th Cir.2000). Here, the statute of limitations is invoked to bar the government from collecting the costs it expended in cleaning up a hazardous waste site, a situation in which we have been specially instructed by the Supreme Court to construe limitations periods in favor of the government. *See Badaracco v. Comm'r*, 464 U.S. 386, 391-92 (1984) ("Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government.") (citing *E.I. Dupont De Nemours & Co. v. Davis*, 264 U.S. 456, 462 (1924)). Additionally, if at all possible, the statute should be interpreted to provide a clear accrual date, so that each party—but especially the State as plaintiff—knows when the time to bring suit runs out. The text of the statute, read as a whole rather than in pieces, specifies that ascertainable date.

Title 42 U.S.C. § 9613(g)(2) provides that the "initiation of physical on-site construction of the remedial action" triggers the statute of limitations. CERCLA defines "remedial action" in section 9601(24):

> The terms "remedy" or "remedial action" means [sic] those actions *consistent with permanent remedy taken instead of or in addition to removal actions* in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such

> actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

42 U.S.C. § 9601(24) (emphasis added). "Removal," in turn, is defined thus:

> The terms "remove" or "removal" means[sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access,

> provision of alternative water supplies, [and] temporary evacuation and housing of threatened individuals not otherwise provided for.... 42 U.S.C. § 9601(23). The plain meaning of the definition of "remedial," read together with the statute of limitations in § 9613(g)(2) and the use of that same term in the rest of the statute, supports the conclusion that "the initiation of physical on-site construction of the remedial action" can only occur after the final remedial action plan is adopted.

The first half of the definition of "remedial action" provides a general description of how such an action fits into the entire scheme of the clean-up required by the statute. Remedial actions, the statute provides, must be "consistent with permanent remedy taken instead of or in addition to removal actions." The second half of the definition lists some activities that could constitute remedial actions. These examples, however, must be read in light of the more general description of the first half.

For example, the "provision of alternative water supplies" is listed as both a type of "remedial action" and as a type of "removal." The provision of alternative water supplies will only be "remedial," therefore, if it is done "consistent[ly] with permanent remedy. . . ." On the other hand, if alternative water supplies are provided on a more temporary basis, the very same activity would be a "removal" action. That is, "removal actions generally are immediate or interim responses, and remedial actions generally are permanent responses." *Geraghty & Miller, Inc. v. Conoco*

Inc., 234 F.3d 917, 926 (5th Cir.2000). In this case, therefore, even if the completed extraction wells do fall under one of the types of activities listed in the second half of the definition of "remedial action" (e.g., "onsite treatment"), the excavation of those wells must still be "consistent with permanent remedy" to have triggered the statute of limitations. For an action to be "consistent with permanent remedy," a permanent remedy must already have been adopted. Neither party can know for sure whether a given action is consistent with permanent remedy until that permanent remedy is determined. The first point at which both parties can be certain that any construction is consistent with a permanent remedy is when the permanent remedy is actually selected. In this case, as in most cases,[3] the permanent remedy was selected when the final RAP was approved.

Until after the adoption of the RAP, then, California could not have brought suit to recover remedial costs. "The standard rule [is] that the limitations period commences when the plaintiff has a complete and present cause of action." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)) (internal quotation marks omitted). "[U]ntil the plaintiff can file suit

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3. In cases where private, non-governmental parties conduct the clean-up of a site without governmental or agency oversight and then pursue response costs under CERCLA, there will most likely still be a remedial action plan in place. *See* 40 CFR § 300.700 (providing that private parties should follow the public notice and comment procedures required of government actors). As no non-governmental response cost suit is before us, however, we do not address the limitation period applicable to such suits.

and obtain relief," a limitations period ordinarily does not commence. *Bay Area Laundry*, 522 U.S. at 201; *see also Reiter v. Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.").

The Department could not have brought suit for costs of remedial action at the time Neville began excavating the extraction wells.[4] At that time, neither party could have known if the wells would eventually be "consistent with permanent remedy," because no final remedial action plan had been decided upon at that point. As we must assume that the limitations period did not begin to run until at least the

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4. This is not to say that the Department was unable to bring *any* suit to recover *any* costs at the time Neville began excavating the extraction wells. Under 42 U.S.C. § 9613(g)(2), "an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred." As soon as the Department expended its first dollar, it could have sued Neville for this dollar and sought a declaratory judgment of Neville's liability for future response costs. However, the availability of the option to bring suit earlier, and thereby obtain a declaratory judgment as to liability, should not confound Congress's clear intention that an *initial* action to recover *remedial* costs may be brought "within 6 years after initiation of physical on-site construction of the remedial action." A suit to recover the costs of particular remedial actions, as opposed to a suit to recover removal costs and obtain a declaratory judgment on liability, can only be brought once those remedial actions have been completed.

time California could have brought suit to recover remedial costs, that period could not have been triggered by the excavation of the wells. To rule otherwise would be to hold, as a practical matter, that California was required to bring suit before April 19, 2000, less than five years after its action for recovery of remedial costs first accrued, even though the statute specifies a six-year limitations period.[5]

In the case at hand, neither party could have known before the final RAP was approved whether any particular construction projects would be "consistent with the final remedy": Before the final remedial action plan was approved, the letters from the Department emphasized and re-emphasized that it did not know whether any of the measures already taken by Neville would or would not be

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5. The legislative history of the Superfund Amendments and Reauthorization Act of 1986 (SARA), which added the statute of limitations provision to CERCLA, is consistent with our interpretation of § 9613(g)(2). When we can interpret a statute by its plain meaning, we only look to the congressional history to "ensure that there is no clearly contrary legislative intent." *Carson Harbor Village, Ltd.*, 270 F.3d at 884. There is none here. The House Report from the Judiciary Committee states: "The statute of limitations provided by this amendment for the initial cost recovery action for a remedial action is three years from the commencement of physical on-site construction of the remedial action, that is, *after the [Remedial Investigation/Feasibility Study] and after design of the remedy.*" H.R. Rep. 99-253(III), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3044 (emphasis added) (referring to one version of the predecessor bill, H.R. 2817, which provided a three-year statute of limitation but was otherwise identical to the final Act with regard to the pertinent limitations provision). The design of the remedy can only occur after the final remedy has been selected in the final remedial action plan.

consistent with the final remedial plan. *See* Letter from the Department to Neville, January 1993 (stating that the Department may discontinue the use of the groundwater extraction and treatment system "in the event it is not effective or if it enhances the migration of contaminants from the Site"); Letter from the Department to Neville, August 1993 (stating that the Department "has not gathered sufficient information and public comment to require any of the alternatives to be implemented as of yet"); *id.* (stating that the Department "reviewed and approved of the [Groundwater] Removal Action as an interim measure" but that the Groundwater Removal Action "is not a Department-approved final Remedial Action, and cannot be construed as such. . . . Therefore, whether the [Groundwater] Removal Action constitutes the groundwater portion of the final Remedial Action cannot be determined at this point.").

Section 9617 of CERCLA, which provides for public participation in selection by the President or a State of a remedial action plan, reinforces our interpretation of "remedial action" as action taken *after* the final remedial action plan has been approved. After mandating a public notice and comment period and a public meeting regarding the proposed remedial action plan, 42 U.S.C. § 9617(a)(1) & (2), the statute provides: "Notice of the final remedial action plan adopted shall be published and the plan shall be made available to the public *before commencement of any remedial action.*" 42 U.S.C. § 9617(b) (emphasis added). So, under the statute, remedial action may not commence—and therefore, the "initiation of physical on-site construction of the remedial action" cannot begin—until *after* a final remedial action plan is adopted.

Appendix A

The statutory provision limiting the time in which a party may commence a suit for natural resource damages also supports this interpretation of "remedial action." Title 42 U.S.C. § 9613(g)(1) states, "In no event may an action for damages under this chapter with respect to [a facility at which a remedial action is scheduled] be commenced . . . before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study. . . ." The reason for this limitation was illuminated in the House Report issued by the Committee on the Judiciary: Congress sought to integrate cost recovery and damages actions. H.R. Rep. 99-253(III), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3044. The premise behind the Report's reasoning is clear: natural resource damages actions and cost recovery actions could not be integrated if damages actions were brought *before* a remedy was selected, because cost recovery suits could not be brought before that point.

Some courts have raised the concern that if one reads the statute, as we do, to provide that "initiation of physical on-site construction of the remedial action" can only take place after the final remedial action plan is approved, much of the definition of "remedial action" would become superfluous. *See, e.g., United States v. Navistar Int'l Transp. Corp.*, 152 F.3d 702, 712 (7th Cir.1998); *California v. Hyampom Lumber Co.*, 903 F.Supp. 1389, 1392-93 (E.D.Cal.1995); *Advanced Micro Devices, Inc. v. Nat'l Semiconductor Corp.*, 38 F.Supp.2d 802, 811 (N.D.Cal.1999) (citing *Hyampom,* 903 F.Supp. at 1393). This concern is unwarranted. First, the definition of "remedial action" has roles in the statute other than defining the onset of one

limitations period. The functional aspects of the definition are critical, for example, in apportioning the percentage of the costs of any clean-up between States and the Fund. *See* 42 U.S.C. § 9604; *see also* 42 U.S.C. § 9621 (requiring that certain standards be met when implementing remedial actions).

Second, even though an action can only be remedial if it is taken after the final remedial action plan is approved, that does not mean that *all* actions taken after the final remedial action plan is approved are remedial.[6] In *Colorado v. Sunoco, Inc.*, 337 F.3d 1233 (10th Cir.2003), for example, the Tenth Circuit was faced with the task of classifying certain actions, all of which took place *after* the EPA chose its permanent remedy, as either "remedial" or "removal" actions. After discussing the character of the various actions in light of the definitions of "remedial" and "removal," the court determined that two of the actions were, in fact, removal

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6. Because of the temporal aspect of our interpretation of "remedial action," we do note that the government can only recover costs as "remedial" if those costs were incurred after the cause of action for such costs accrues. Any costs incurred before the remedial action plan was finally designated (such as the construction of the extraction wells in this case) may be recovered, however, as "removal" costs, and are subject to the statute of limitations for removal actions. *See* 42 U.S.C. § 9613(g)(2)(A) ("An initial action for recovery of the costs referred to in section 9607 of this title must be commenced . . . [,] for a removal action, within 3 years after completion of the removal action. . . ."); 42 U.S.C. § 9613(g)(2)(B) ("[I]f the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.").

actions, both because they were interim rather than permanent measures, taken in response to the threat of release of contaminated water, and because similar activities had been denominated "removal action" by the EPA in previous clean-ups. *Id.* at 1244-45. Thus, as *Sunoco* illustrates, our interpretation of the statute of limitations does not render any part of the definition of "remedial" superfluous.

B. *Decisions of Other Circuits*

Our conclusion that no action can be "remedial" until a final remedial action plan is in place is consistent with the *results* reached by every court of appeals that has considered the onset of the limitations period for recovery of remedial action costs under CERCLA, if not with all the reasoning of those cases.

In *Geraghty,* the Fifth Circuit held that the installation of monitoring wells could not have triggered the statute of limitations because it occurred before the government agency overseeing the clean-up had issued its final approval of the remedial plan. *See Geraghty,* 234 F.3d at 927. The Seventh Circuit also reached the same result as we do, although some of its reasoning differed from ours. *See Navistar,* 152 F.3d at 711-12. In *Navistar,* although the final remedial design was not approved until 1990, the final remedial action plan,[7]

7. A remedial design is a term of art in CERCLA, and differs both substantively and temporally from a final remedial action plan. While there is no explicit definition of "remedial action plan" in either the statute or the regulations implementing it, the regulations do provide a detailed description of the process whereby a final (Cont'd)

selecting a permanent clay cap as part of the permanent remedy, was apparently approved before that. *Id.* at 704 ("At the conclusion of this process[, which ended before February 1989], the EPA determined that, among other things, the landfill needed to be covered with a permanent clay cap to isolate the hazardous materials from the rest of the environment."). Thus, although the Seventh Circuit rejected

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(Cont'd)
remedy is selected by the agency. In this process, the lead agency must present a proposed plan, which fits the description of the "remedial action plan" of CERCLA's Section 9617, to the public. 40 CFR § 300.430(f)(2). The "proposed plan" must "briefly describe[] the remedial alternatives analyzed by the lead agency, propose[ ] a preferred remedial action alternative, and summarize[] the information relied upon to select the preferred alternative." *Id.* The regulation continues, "The purposes of the proposed plan is to supplement the RI/FS and provide the public with a reasonable opportunity to comment on the preferred alternative for remedial action, as well as alternative plans under consideration, and to participate in the selection of remedial action at a site." *Id.* The remedy chosen in the remedial action plan is only generally described in that document, leaving for a subsequent date the actual design of the plan's physical implementation. *See* 40 CFR § 300.430(f)(1)- (6) (describing the process by which the lead agency chooses a final remedy and documents its selection in a record of decision); *see also* 42 U.S.C. § 9617 (providing publication requirements in the event that the remedial action differs from the adopted final remedial action plan).

The final remedial design, on the other hand, while based on the remedy adopted in the RAP, is distinct: it is "the technical analysis and procedures which follow the selection of remedy for a site and result in a detailed set of plans and specifications for implementation of the remedial action." 40 CFR § 300.5.

a bright-line rule in which the final remedial design had to be formally approved before an action could be considered remedial, the action that it found to be remedial— installing the clay cap—occurred after the final remedial action plan was chosen. Because our holding finds the pivotal event for defining the initiation of remedial action is the adoption of a remedial action plan—not a final remedial design—the facts in *Navistar* would have led us to find the suit barred by the limitations period as well.

Finally, the Tenth Circuit, while not expressly rejecting a bright-line rule, has distinguished "remedial actions" from "removal actions" based solely on the more "descriptive" parts of their definitions. *See Sunoco, Inc.*, 337 F.3d at 1244-45; *see also Pub. Serv. Co. of Colo. v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir.1999) (distinguishing "remedial actions" from "removal actions" in a context other than the triggering of the statute of limitations). In both the Tenth Circuit cases, however, it appears that the actions in question took place *after* a remedial action plan was in place. *See Sunoco*, 337 F.3d at 1237, 1244-45; *Pub. Serv. Co.*, 175 F.3d at 1179, 1182-84. Were we faced with the same facts, we, too, would have to turn to the descriptive aspects of the definitions to determine whether the actions at issue in *Sunoco Inc.* and *Public Service Co.* were remedial or removal. For the same reasons the result in *Navistar* is not in conflict with our holding, then, these Tenth Circuit cases do not conflict, either.

In sum, we conclude that the "initiation of physical on-site construction of the remedial action" can only occur after the final remedial action plan is adopted, and that, in this

case, the statute of limitations, therefore, could not have begun to run until the final remedial action was approved on May 8, 1995. The Department's suit was brought within six years of the approval of the remedial action plan and is not, thus, barred by the statute of limitations.

II. *Neville's Defenses on the Merits*

Neville raised an affirmative defense—waiver and estoppel—in the district court. The argument was that Neville cannot be liable under CERCLA for the costs of overseeing the clean-up incurred by the Department because the Department had promised that it would not sue Neville for full recovery costs if Neville conducted the research, planning, and clean-up of the site. The district court ruled that Neville could not assert equitable defenses to a CERCLA recovery action. We review the grant of summary judgment de novo. *United States v. Chapman,* 146 F.3d 1166, 1169 (9th Cir.1998).

CERCLA section 107(a) and (b), 42 U.S.C. § 9607(a) and (b), allow for only three defenses to CERCLA liability. A covered person is liable under the statute "subject only to the defenses set forth in subsection (b) of this section." 42 U.S.C. § 9607(a). Subsection (b) lists three defenses "(1) an act of God; (2) an act of war; [and] (3) an act or omission of a third party. . . ." 42 U.S.C. § 9607(b)(1)-(3). In *Levin Metals Corp. v. Parr- Richmond Terminal Co.,* 799 F.2d 1312, 1316-17 (9th Cir.1986), we suggested that these defenses were exclusive.

> Congress imposed strict, but not absolute, liability under CERCLA. It provided defenses to liability

> for causation solely by an act of God, an act of war, or acts or omissions of a third party.... Consequently, in order to state a claim for declaration of nonliability, the declaratory judgment plaintiff *must* base its claim of nonliability on one or more of the statutory affirmative defenses.

Id. (emphasis added) (internal quotation marks and citations omitted).

Every court of appeals that has considered the precise question whether § 9607 permits equitable defenses has concluded that it does not, as the statutory defenses are exclusive. *See Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir.1990) (holding that CERCLA does not provide an "unclean hands" defense) (questioned on other grounds in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994)); *see also Blasland, Bouck & Lee, Inc. v. City of North Miami*, 283 F.3d 1286, 1304 (11th Cir.2002) (holding that CERCLA bars equitable defenses); *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir.1993) (same); *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268, 1270 (7th Cir.1994) (same). Following the implication of *Levin Metals* and the express holdings of these cases from other circuits, we conclude that the three statutory defenses are the only ones available, and that traditional equitable defenses are not. The district court was correct, therefore, in holding that Neville could not raise equitable defenses to liability under CERCLA.

Neville argues separately that equitable defenses are at least relevant to the *amount* of recovery that the Department receives. Even if it is liable for some of the oversight costs, Neville asserts, that amount is limited by equitable consideration that the Department's implied promise to pursue recovery of only a limited "activity fee," rather than the Department's actual recovery- oversight costs. Neville cites as support for this argument numerous cases in which courts considered equitable factors in allocating costs in suits for *contribution. See, e.g., Alcan-Toyo Am., Inc., v. N. Ill. Gas Co.*, 881 F.Supp. 342, 346-47 (N.D.Ill.1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 909 F.Supp. 1154, 1161-62 (N.D.Ind.1995); *New York v. Almy Bros.*, 971 F.Supp. 69, 73 (N.D.N.Y.1997).

Suits for *contribution,* however, are entirely distinct under the statute from suits for *recovery of costs.* The former is governed by 42 U.S.C. § 9613(f)(1), which explicitly states, "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." The provisions of CERCLA governing suits for recovery of costs, 42 U.S.C. §§ 9607(a) and 9613(g)(2), make no such reference to equitable factors. Also, "the critical distinction between [suits for contributions and suits for cost recovery] is that under § 107 [42 U.S.C. § 9607(a)], the court merely determines whether the party is jointly and severally liable, without regard to the amount of fault; but under § 113 [42 U.S.C. § 9613(f)(1)], the court also divides the fault of the parties, using equitable factors." *Catellus Dev. Corp. v. L.D. McFarland Co.*, 910 F.Supp. 1509, 1514 (D.Or.1995).

California is not bringing suit here for contribution, so the specific language allowing the court to consider equitable factors when apportioning contribution is inapplicable.

Neville makes one last defensive argument: The Department may not sue for its recovery costs, Neville contends, because those costs were not consistent with the national contingency plan. Whether a party can recover certain costs under § 9607 depends on whether or not those costs were incurred consistently with the "national contingency plan." 42 U.S.C. § 9607(a)(4)(A)-(providing that a covered person who violates CERCLA "shall be liable for . . . all costs of removal or remedial action incurred by the . . . State . . . *not inconsistent with the national contingency plan*") (emphasis added). The national contingency plan is promulgated by the EPA and "provide [s] the organizational structure and procedures for preparing and responding to . . . releases of hazardous substances." 40 C.F.R. § 300.1. *See also Wash. St. Dep't of Transp. v. Wash. Natural Gas Co.*, 59 F.3d 793, 799 (9th Cir.1995) ("WSDOT"). To show that the Department's actions were inconsistent with the national contingency plan, the burden is on Neville to show that the Department acted in an arbitrary and capricious manner in choosing a particular response action. *See id.* at 802 (citing *United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir.1992)). When a state is seeking recovery of response costs, consistency with the national contingency plan is presumed. *Id.* at 799-800.

Neville has provided no evidence that the Department acted "arbitrarily and capriciously *in choosing a particular response action* to respond to a hazardous waste site."

Hardage, 982 F.2d at 1442 (emphasis added). *Accord WSDOT*, 59 F.3d at 802 ("To prove that a response action of the EPA was inconsistent with the NCP, a defendant must prove that the EPA's *response action* was arbitrary and capricious.") (emphasis added). In fact, Neville does not challenge any response action taken by the Department. Neville challenges instead the Department's attempt to recover the full oversight costs after suggesting that, should Neville cooperate and conduct the clean-up itself, the Department would only require Neville to pay an "activity fee." This change in policy and pursuit of the full costs of oversight cannot be "inconsistent with" the national contingency plan, as the national contingency plan does not direct the state to limit its recovery of response costs in any way. *See* 40 C.F.R. §§ 300.1 et seq. The district court, therefore, did not err by finding that Neville was responsible for all the Department's response costs.

III. *Motion for Leave to Amend*

Finally, Neville appeals the district court's denial of its motion for leave to amend its counterclaim. We review the district court's denial of Neville's motion for leave to amend for an abuse of discretion. *See Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 879 (9th Cir.1999).

Generally, leave to amend pleadings "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). "[T]he grant or denial of an opportunity to amend is within the discretion of the District Court," and denial of leave to amend is appropriate if the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). "[F]utility includes the

inevitability of a claim's defeat on summary judgment." *Johnson v. Am. Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir.1987).

Neville moved to amend its complaint to allege a violation of due process and equal protection under the California Constitution. The district court denied Neville's motion for leave to amend because the court determined that amendment would be futile. The district court held that, even if Neville were to amend its complaint and allege a violation of equal protection, Neville could not point to a triable issue of material fact to support such an allegation. On appeal, Neville argues only that the district court erred by (1) holding that the California Constitution requires a showing of "invidious discrimination" to prove selective prosecution, and (2) refusing to compel discovery on the issue of selective prosecution.

The district court did not abuse its discretion. First, the court was correct in its interpretation of California constitutional law in holding that Neville had to allege discrimination based on an "invidious" criterion. *Baluyut v. Superior Court*, 911 P.2d 1, 5 (1996), on which Neville exclusively relies, holds that a defendant must show that "he has been deliberately singled out for prosecution on the basis of some invidious criterion" in order to prove discriminatory prosecution. *Id.* (citation and internal quotation marks omitted). That case goes on to define "invidious" as "unrelated to legitimate law enforcement objectives." *Id.* at 6. Additionally, *Baluyut* states that "[u]nequal treatment which results simply from laxity of enforcement or which reflects a nonarbitrary basis for selective enforcement of a

statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement." *Id.* at 5.

Neville fails to allege, first, that other similarly situated parties were excused from paying the full oversight costs and thus that it was "deliberately singled out for prosecution." Even if Neville could show this, it would have to allege also that the reason for this discrepancy was not simply laxity of enforcement, but was in fact a result of invidious discrimination, i.e., unrelated to law enforcement purposes. As the record now stands, Neville has shown that the Department changed its policy about collecting oversight costs. However, this change was explained by the Department: the agency determined that the non-enforcement policy was inconsistent with state statutes. Thus, the Department has provided a non-arbitrary, law enforcement rationale for the change in policy. On the basis of this record, the district court did not abuse its discretion by denying leave to amend, or by denying discovery when no actionable injury was alleged.

AFFIRMED.

APPENDIX B — REVISED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JULY 31, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CASE NO.: 00-10205 CAS (Ex)

STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,

Plaintiff,

v.

NEVILLE CHEMICAL COMPANY, a corporation; and DOES 1-10,

Defendants.

REVISED FINAL JUDGMENT

In orders dated March 26, 2002, and May 10, 2002, the Court granted Plaintiff's Motion for Summary Judgment, Or In The Alternative, Partial Summary Judgment. On July 11, 2002, the Court granted Plaintiff's Motion for Judgment on the Pleadings. On the basis of these rulings, and having reviewed and considered the papers submitted in support of said motions and in support of Plaintiff's costs, including attorneys' fees, and oral argument of counsel, IT IS ORDERED AND ADJUDGED that:

Appendix B

Defendant Neville Chemical Company is liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") section 107(a), 42 U.S.C. § 9607(a) for Plaintiff's response costs, including interest and reasonable attorneys' fees, in the amount of $1,097,402.60, which the Plaintiff has incurred responding to the release or threatened release of hazardous substances from the Neville Chemical Company facility, located in 12800 East Imperial Highway, Santa Fe Springs, California ("Neville facility").

Furthermore, pursuant to CERCLA section 113(g)(2), 42 U.S.C. § 9613(g)(2), Defendant Neville Chemical Company is liable for all future response costs incurred by the Plaintiff in responding to the release or threatened release of hazardous substances from the Neville facility.

Dated: July 30, 2002

By: s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

APPENDIX C — ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION DATED JULY 10, 2002 AND FILED JULY 11, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV 00-10205 CAS (Ex)

STATE OF CALIFORNIA,

Plaintiff,

v.

NEVILLE CHEMICAL CO.,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

The Court finds plaintiff's motion appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15.

I. INTRODUCTION

This case is a cost-recovery action brought by plaintiff State of California on behalf of the Department of

Toxic Substances Control ("DTSC") against defendant Neville Chemical Company pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* In an order dated May 16, 2002, the Court granted plaintiff's motion for summary judgment on the issue of defendant's liability for response costs incurred by plaintiff pursuant to the CERCLA while supervising the cleanup of hazardous materials at defendant's chemical manufacturing facility. In granting summary judgment, the Court found that defendant's affirmative defense of equitable estoppel was not available under CERCLA, but did not explicitly address defendant's counterclaim for equitable estoppel. May 16, 2002 Order Granting Plaintiff's Motion For Summary Judgment ("May 16, 2002 Order"). Defendant communicated to plaintiff that it intended to proceed with its counterclaim.

On May 22, 2002, plaintiff filed an *ex parte* application for "clarification *re* counterclaims," and on May 31, 2002, plaintiff filed a motion for judgment on the pleadings. In both its *ex parte* application and its motion, plaintiff argued that: (1) the Court has already determined the equitable estoppel issue in plaintiff's favor; (2) a party found to be liable pursuant to CERCLA cannot escape liability by claiming equitable estoppel, whether that claim is characterized as an affirmative defense or a counterclaim; (3) California law does not provide for an independent claim for equitable estoppel; and (4) even if defendant were to properly state a counterclaim for equitable estoppel, that claim would fail as a matter of law because defendant cannot establish that DTSC, a government agency, engaged in affirmative misconduct, or that the injury caused to defendant by DTSC's alleged wrongful acts outweighs the damage to the public of imposing liability on DTSC. On June

19, 2002, the Court rejected defendant's counterclaim to the extent it was based on a theory of equitable estoppel because it was merely an attempt to relitigate issues that had already been decided by the Court, and because under California law equitable estoppel acts defensively only and cannot form the basis for an independent claim. June 19, 2002 Order on Plaintiff's *Ex Parte* Application For Clarification Re: Counterclaim and Plaintiff's Motion For Judgment on the Pleadings ("June 19, 2002 Order") at 3. However, the Court found that "defendant's memoranda appear to suggest that its counterclaim is actually based on alleged due process or equal protection violations stemming from plaintiff's alleged disparate treatment of defendant in relation to other CERCLA responsible parties." *Id.* The Court construed defendant's allegations of due process and equal protection violations as a request for leave to amend the counterclaim, and requested additional briefing as to whether defendant should be permitted to amend the counterclaim. The parties timely submitted supplemental briefs. Defendant attaches a proposed amended complaint to its supplemental brief. The proposed amended complaint contains the following new allegation:

> On information and belief Neville alleges that it has been the victim of a selective enforcement action in violation of Neville's rights to due process and equal protection under the law as guaranteed by Article 1, Section 7 of the California Constitution.[1]

Proposed Amended Counterclaim ¶ 15.

1. Article I, Section 7 of the California Constitution states, in relevant part, that "a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . . . ."

Appendix C

II. LEGAL STANDARD

Fed. R. Civ. P. 15(a) provides for the amendment of pleadings by leave of court and notes that such leave "shall be freely granted when justice so requires." *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Leave to amend is within the sound discretion of the district court, but denial is proper if the amendment would be futile, if there has been any undue delay, bad faith or dilatory motive on the part of the movant, or if allowing the amendment would result in undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 772 (9th Cir. 1991).

III. DISCUSSION

Plaintiff argues that leave to amend should be denied because defendant's proposed amendment is futile. A proposed amendment is futile if the new claim could be defeated by a motion to dismiss or a motion for summary judgment. *Johnson v. American Airlines, Inc.*, 834 F.2d 721, 724 (9th Cir. 1987). Plaintiff argues that there is no basis in law or fact for defendant's due process or equal protection claims brought pursuant to the California constitution.

In order to show a violation of due process rights under federal law, defendant would have to demonstrate that plaintiff treated it in a manner that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996). Where, as in this case, a

party is alleging deprivation of a defined property right, the scope of the California constitution's due process protection is virtually the same as that of the federal constitution. *Traverso v. People ex rel. Dept. of Transportation*, 6 Cal. 4th 1152, 1163 (1993); *see also People v. Ramirez*, 25 Cal. 3d 260, 268 (1979) ("the touchstone of due process is the protection of the individual against the arbitrary action of government"). Furthermore, "selective enforcement of valid laws, without more, does not make [a particular enforcement] action irrational." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1188 (9th Cir. 1995) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). As plaintiff correctly points out, the Court has already ruled that plaintiff's conduct in seeking cost recovery, which forms the basis for defendant's proposed counterclaim for due process violations, was not arbitrary and capricious. June 19, 2002 Order at 3, March 26, 2002 Order Granting in Part Plaintiff's Motion for Summary Judgment at 23. As a result, the Court finds that there is no basis upon which defendant can state a claim for violations of due process.

Defendant's proposed equal protection claim is founded on its allegation that it is the "victim of a selective enforcement action." However, under both the federal and California constitutions, selective enforcement of the law does not constitute an equal protection violation unless it is "the deliberate product of invidious discrimination based upon some improper criterion." *People v. Superior Court of Los Angeles County*, 70 Cal. App. 3d 341, 343 (1977); *see also United States v. Kidder*, 869 F.2d 1328, 1335 (9th Cir. 1989) ("'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation'

so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'") (quoting *Bordenkircher*, 434 U.S. at 364); *Murgia v. Municipal Court*, 15 Cal. 3d 286, 290 (1975) ("Neither the federal nor state Constitution countenances the singling out of an invidiously selected class for special prosecutorial treatment, whether that class consists of black or white, Jew or Catholic, Irishman or Japanese, United Farm Worker, or Teamster. If an individual can show that he would not have been prosecuted except for such invidious discrimination against him, a basic constitutional principal has been violated, and such a prosecution must collapse upon the sands of prejudice."). Accordingly, in order to maintain a claim for equal protection violations based on selective enforcement, defendant must show that it was selected for enforcement "on the basis of an impermissible ground such as race, religion or exercise of [] constitutional rights." *Kidder*, 869 F.2d at 1336. Furthermore, defendant must show that the selective prosecution was "motivated by a discriminatory *purpose*." *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)) (emphasis added in *Kidder*). Here, defendant has not alleged, much less shown, facts which suggest that it was selected for a CERCLA cost-recovery action on any impermissible ground such as race, religion or the exercise of constitutional rights. In fact, at a earlier stage of the litigation, Neville's counsel stated at oral argument that "[w]e have not alleged that we were treated differently from other people. . . ." Appendix to Pl's. Supp. Brief in Opp'n to Def's. Request to Amend Counterclaim (Transcript of March 11, 2002 hearing) at 12:10-12. In addition, defendant has failed to point to any facts which would indicate that the government had a discriminatory

motive in choosing to prosecute him. For these reasons, the Court finds that defendant has stated no basis for going forward with its equal protection claim.[2]

IV. CONCLUSION

For the reasons discussed above, defendant's request to amend the counterclaim is DENIED. Plaintiff's motion for judgment on the pleadings in therefore GRANTED. Plaintiff shall submit a revised form of judgment to reflect its current attorneys' fees and costs.

IT IS SO ORDERED.

Dated: July 10, 2002

s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

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2. Defendant appears to argue that further discovery as to plaintiff's cost-recovery practices may reveal evidence of discriminatory motive. However, defendant does not support this argument with any showing whatsoever which would tend to suggest invidious discrimination. The Court finds that because on the record before it defendant's discrimination theory is wholly speculative, it would be inappropriate to allow further discovery. *See People v. Superior Court of Los Angeles County*, 70 Cal. App. 3d at 344 (holding that the office of the Attorney General was not compelled to answer interrogatories from a defendant in a civil enforcement action concerning its enforcement policies where that defendant had made no preliminary showing of invidious discrimination).

APPENDIX D — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ISSUED JUNE 19, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTE ORDER

Case No.: CV 00-10205 CAS (Ex) June 19, 2002

Title: STATE OF CALIFORNIA v. NEVILLE CHEMICAL CO. et al.

PRESIDING: HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

Maynor Galvez, Deputy Clerk — none present, Court Reporter

PLAINTIFF COUNSEL PRESENT

DEFENDANT COUNSEL PRESENT

PROCEEDINGS: (1) **PLAINTIFF'S *EX PARTE* APPLICATION FOR (1) CLARIFICATION RE COUNTERCLAIM; (2) STAY OF DISCOVERY; (3) CORRECTION OF CLERICAL MISTAKE IN MAY 16, 2002 ORDER (filed May 22, 2002)**

(2) **PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS (filed May 31, 2002)**

Appendix D

The Court finds plaintiff's motions appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing date of June 24, 2002, is hereby vacated and the matter taken under submission.

I. INTRODUCTION

This case is a cost-recovery action brought by plaintiff State of California on behalf of the Department of Toxic Substances Control ("DTSC")[1] under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq*. In an order dated May 16, 2002, the Court granted plaintiff's motion for summary judgment on the issue of defendant's liability for response costs incurred by plaintiff pursuant to the CERCLA while supervising the cleanup of hazardous materials at defendant's chemical manufacturing facility. In granting summary judgment, the Court found that defendant's affirmative defense of equitable estoppel was not available under CERCLA, but did not explicitly address defendant's counterclaim for equitable estoppel. May 16, 2002 Order Granting Plaintiff's Motion For Summary Judgment ("May 16, 2002 Order").

On May 22, 2002, plaintiff filed an ex parte application for (1) clarification re counterclaim, (2) stay of discovery, and (3) correction of a clerical mistake in the May 16, 2002 Order.[2]

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1. The Court will refer to plaintiff as DTSC.

2. Page 11 of the May 16, 2002 Order mistakenly states that Neville, rather than DTSC, "is entitled to interest on those costs and its reasonable attorneys' fees." The Court hereby corrects that error pursuant to Fed. R. Civ. P. 60(a).

Appendix D

Plaintiff argues that the Court's holding on summary judgment to the effect that defendants do not have an affirmative defense of equitable estoppel under CERCLA also operates to compel summary judgment in plaintiff's favor on defendant's counterclaim for equitable estoppel. Plaintiff further argues that the issues surrounding defendant's counterclaim for equitable-estoppel were fully briefed and argued in the context of defendant's claimed affirmative defense. In its opposition to the *ex parte* application, defendant argues that its counterclaim for equitable estoppel differs from its affirmative defense of equitable estoppel because it is governed by state law, rather than CERCLA. On May 29, 2002, the Court issued an order staying discovery, and requested supplemental briefing on the question of whether Neville's counterclaim should be denied on the basis of the Court's earlier grant of summary judgment. May 29, 2002 Order on Plaintiff's *Ex Parte* Application. On May 31, 2002, plaintiff filed a motion for judgment on the pleadings. In its motion, plaintiff argues that: (1) the Court has already determined the equitable estoppel issue in plaintiff's favor: (2) a party found to be liable pursuant to CERCLA cannot escape liability by claiming equitable estoppel, whether that claim is characterized as an affirmative defense or a counterclaim; (3) California law does not provide for an independent claim for equitable estoppel; and (4) even if defendant were to properly state a counterclaim for equitable estoppel, that claim would fail as a matter of law because defendant cannot establish that DTSC, a government agency, engaged in affirmative misconduct, or that the injury caused to defendant by DTSC's alleged wrongful acts outweighs the damage to the public of imposing liability on DTSC.

Appendix D

II. DISCUSSION

Defendant's counterclaim alleges that according to representations made to it by plaintiff, and according to plaintiff's policy at the time, its payment of an activity fee in 1989 in the amount of $46,636 operated as a full settlement of its obligation to plaintiff to reimburse it for additional response costs. Defendant argues that due to this justifiable reliance, plaintiff should be equitably estopped from collecting further response costs. The Court has already held that equitable estoppel is not a valid affirmative defense to CERCLA liability. The Court has also previously determined that the specific conduct on the part of plaintiff which forms the basis for defendant's counterclaim is not arbitrary and capricious. Based on what is alleged in the counterclaim, the Court finds that defendant's counterclaim is simply an attempt to relitigate issues that have already been decided by the Court by recasting its affirmative defenses as a counterclaim. Further, California does not recognize an affirmative claim for equitable estoppel. *See Money Store Corp. v. Southern California Bank*, 98 Cal App. 4th 722 (2002) (equitable estoppel cannot form the basis for a separate claim because "[t]he doctrine acts defensively only"). *See also Pacific Gas & Electric v. Zuckerman*, 189 Cal. App. 3d 1113, 1144 (1987); *Peskin v. Phinney*, 182 Cal. App. 2d 632, 636 (1960). For these reasons, defendant's counterclaim for equitable estoppel must fail.

Although it does not appear on the face of the counterclaim, defendant's memoranda appear to suggest that its counterclaim is actually based on alleged due process or equal protection violations stemming from plaintiff's alleged

disparate treatment of defendant in relation to other CERCLA responsible parties. The Court will construe defendant's allegations of due process and equal protection violations as a request for leave to amend its counterclaim. The Court finds that additional briefing is necessary in order to evaluate this request. The Court therefore directs defendant to file a supplemental brief, not to exceed 10 pages, explaining the nature and basis of the due process and equal protection claims they seek to advance. Defendant's brief shall be filed no later than June 26, 2002. Plaintiff is directed to file a response, also not to exceed 10 pages, explaining why defendant should not be permitted to amend its counterclaim. Plaintiff's response shall be filed no later than July 3, 2002. The matter will thereafter be taken under submission.

IT IS SO ORDERED.

APPENDIX E — ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION FILED MAY 10, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-00-10205 (Ex)

STATE OF CALIFORNIA, on behalf of the California Department of Toxic Services,

Plaintiff,

vs.

NEVILLE CHEMICAL COMPANY, a corporation; and DOES 1-10,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This case is a cost-recovery action brought by plaintiff State of California on behalf of the Department of Toxic

Substances Control ("DTSC")[1] under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* DTSC seeks to recover costs associated with the cleanup of hazardous substances at a chemical manufacturing plant owned and operated by defendant Neville Chemical Company ("Neville"). In an Order dated March 26, 2002, the Court granted in part plaintiff's motion for summary judgment that Neville was liable for all recovery costs not inconsistent with the National Consistency Plan ("NCP"), but permitted supplemental discovery and briefing on the issue of whether DTSC's recovery costs were inconsistent with the NCP. Order Granting in Part Plaintiff's Motion For Summary Judgment ("March 26, 2002 Order") at 16, 25.[2] Both parties submitted supplemental briefing, and the Court heard oral argument at an April 29, 2002 status conference.

II. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

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1. The Court will refer to plaintiff as DTSC.

2. The factual background to this case is set forth in the March 26, 2002 Order.

Appendix E

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed.R.Civ.P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888 (1990). *See also Celotex Corp.*, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. *See also Abromson v. American Pacific Corp.*, 114 F.3d 898, 902 (9th Cir.1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 631 & n.3 (9th Cir.1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir.1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita,* 475 U.S. at 587.

Appendix E

III. DISCUSSION

CERCLA holds responsible parties liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe *not inconsistent with the national contingency plan.*" 42 U.S.C. § 9607(a)(4)(A) (emphasis added). Under CERCLA, a party may recover costs related to actions necessary to effectuate cleanup or removal from the environment of released hazardous substances, actions taken in the event of the threat of release of hazardous substances, actions to monitor, assess and evaluate the release or threatened release of hazardous substances, the disposal of removed material, and actions consistent with a permanent remedy. 42 U.S.C. § 9601(23)-(24). Response costs recoverable under CERCLA include oversight costs incurred by a government agency in an effort to ensure that a site is being adequately investigated and remediated by responsible parties. *State of California v. Celtor Chemical Corp.*, 901 F.Supp. 1481, 1489-90 (N.D.Cal.1995); *State of California v. SnyderGeneral Corp.*, 876 F.Supp. 222, 224-25 (E.D.Cal.1994). Recoverable response costs also include reasonable attorneys' fees for bringing cost-recovery litigation, as well as indirect costs, or overhead. *Chapman,* 146 F.3d at 1175 (attorneys' fees); *United States v. R.W. Meyer,* 889 F.2d 1497, 1503 (6th Cir.1989) (indirect costs). DTSC contends that its employees have spent thousands of hours since 1985 responding to the releases of hazardous substances at the Neville site. DTSC also contends that attorneys in the California Attorney General's Office have spent more than one thousand hours litigating the present case. Declaration of Laurie Pearlman In Support of Plaintiff's Motion For

Summary Judgment ("Pearlman Decl.") ¶7, Declaration of Harrison Pollak In Support of Plaintiff's Motion For Summary Judgment ("Pollak Decl.") ¶5. Neville concedes "that DTSC has incurred costs in overseeing the investigation and remediation of environmental contamination associated with the Neville site." Pearlman Decl., Ex. A at 30:3-4, but argues that DTSC is not entitled to recover those costs because they are inconsistent with the NCP.

A. Inconsistency with the NCP

Response actions undertaken by a federal or state governmental entity, or an Indian tribe, are presumed to be consistent with the NCP. *Washington State Dept. of Transportation v. Washington Natural Gas Co., ("WSDOT")*, 59 F.3d 793, 799-800 (9th Cir.1995). Thus, when a governmental body such as DTSC seeks to recover its costs, it is the defendant's burden to prove that a particular government action is inconsistent with the NCP in order to preclude the government from recovering the costs of taking that action. *Id.* at 800. In order to meet this burden of proof, the defendant must show that the government's particular action was arbitrary and capricious. *Id.* at 803; 42 U.S.C. § 9613(j)(2).

In opposition to DTSC's motion for summary judgment, Neville argues that DTSC's actions are inconsistent with the NCP because: (1) DTSC acted in an arbitrary and capricious manner when it allegedly represented that it would not seek cost recovery against Neville, but later did so; and (2) DTSC has offered insufficient documentary evidence to support the recovery of some of its claimed costs. In its March 26, 2002

Order, the Court held that Neville had not raised a material question of fact to support its first argument. Therefore, the only question remaining is whether there is a material question of fact that DTSC's alleged failure to document its claimed costs properly was arbitrary and capricious.

The NCP provides that:

> During all phases of response, the lead agency shall complete and maintain documentation to support all actions taken under the NCP and to for the basis for cost recovery. In general, documentation shall be sufficient to provide . . . accurate accounting of federal, state, or private party costs incurred for response actions . . .

40 C.F.R. § 300.160(a)(1). The regulation does not further define "accurate accounting" or elaborate on what is meant by "sufficient." *United States v. Chrysler Corp.*, 168 F.Supp.2d 754, 769 (N.D.Ohio 2001). Neville argues that DTSC's documentation is not sufficient to provide for accurate accounting, and is thus arbitrary and capricious, in the following respects: (1) DTSC's documentation of employee labor costs does not provide a specific description of the duties of particular employees who worked at the Neville site; (2) DTSC's documentation of travel expenses fails to explain what necessitated the travel; (3) three invoices issued by DTSC contain discrepancies; (4) DTSC failed to explain fluctuations in the calculation of indirect cost ratios between 1989 and 1995; and (5) DTSC failed to explain why some direct labor costs were funded using bond funds, while others were not. The Court will consider each of these arguments below.

Appendix E

1. Employee Labor Costs

Neville argues that DTSC's employee labor costs are inconsistent with the NCP because the timesheets prepared by DTSC employees:

> "fail to provide an adequately detailed explanation of the actual services performed by the employees [because] [p]roject activity codes ('PCA') used to designate DTSC site related functions are too general to allow one to determine what specific employee activity a given [Summary By Activity ('SBA')] entry documents. Without more specific information regarding the actual work performed by an employee, the labor charges cannot be verified as to their reasonableness, necessity and/or association with environmental activities associated with the Neville property."

Declaration of Peter Johnson in Support of Defendant's Supplemental Brief in Opp'n to Plaintiff's Motion For Summary Judgment ("Johnson Suppl. Decl.") ¶3.[3] DTSC has provided Neville with employee time sheets documenting all the time which DTSC employees allegedly spent on the Neville project dating back to 1985. According to a declaration filed by Jeffrey Mahan, who served as DTSC's

3. DTSC objects to the Johnson declaration on the grounds that he is not qualified as an expert. Johnson declares that he has been engaged in the environmental engineering and cost analysis field since 1981. Johnson Suppl. Decl. ¶1. The Court finds that Johnson is sufficiently qualified by knowledge, skill, experience, training or education to testify as an expert pursuant to Fed.R.Evid. 701.

Chief of Audits Unit from 1989 to 1997 and is currently DTSC's Special Assistant for Cost Recovery and Reimbursement Policy, DTSC's time sheets are attested to by the employee and then reviewed and certified by the employee's direct supervisor. Declaration of Jeffrey Mahan in Support of Plaintiff's Motion For Summary Judgment ("Mahan Decl.") ¶¶ 2, 3, 11. The time sheets require that every hour worked by a DTSC employee be allocated to an activity code, or PCA, and a site code. *Id.* ¶9. The PCAs correlate to relatively broad activity categories, such as "Remedial Investigations/Feasibility Study," "Removal Actions," "Public Participation Plan Development and Implementation," and "Cost Recovery." DTSC periodically issues a coding manual, available to the public, that provides information about what specific activities fall into each PCA category. The site codes correlate to specific DTSC projects. The thrust of Neville's argument is that DTSC's time sheets do not provide a specific description of exactly what task an employee was engaged in at a particular time on the Neville site. However, Neville has not cited any case where a specific description of exactly what task the employee performed at a particular time was held to be required by 40 C.F.R. § 300.160(a)(1). Several courts, including the Ninth Circuit, have accepted documentation such as that presented by DTSC as adequate for the purposes of 40 C.F.R. § 300.160(a)(1). *See Chapman,* 146 F.3d at 1171 (government agency's documentation of costs was consistent with the NCP where the agency "kept extensive records of recovery costs in the form of timesheets, cost estimates, and accountant and attorney declarations"); *United States v. Chromalloy American Corporation,* 158 F.3d 345, 352 (5th Cir.1998) (government agencies documentation of costs was sufficient

where it submitted "detailed cost summaries of its oversight expenses"); *Chrysler Corp.*, 168 F.Supp.2d at 769 (contractor's invoices, which broke down expenses into eight general categories such as labor, travel and subsistence, were sufficiently specific standing alone to meet the requirements of 40 C.F.R. § 300.160(a)(1), in spite of contractor's failure to provide "project daily summaries, project daily details, reimbursable travel and subsistence logs, contractor personnel reports, equipment usage logs, and subcontractor reports. . . .").[4] In the instant case, the time sheets provided by DTSC show in detail how much time individual employees spent at the Neville site, as well as their billing rate and the general category of activity in which they were engaged. Furthermore, Neville has submitted no evidence suggesting that DTSC's decision not to document precisely what activity employees were engaged in at the Neville site at any particular time led to any accounting problems during the Neville site cleanup.[5] Accordingly, the Court finds that the time sheets utilized by DTSC provide sufficient documentation to permit accurate accounting, and DTSC's procedures for accounting for employee labor costs are not arbitrary and capricious,

4. The *Chrysler Corp.*, court held that summary judgment was inappropriate on some of the contractor's expenses, due to mistakes and inconsistencies in the invoices themselves. *Chrysler Corp.*, 168 F.Supp.2d at 769-70.

5. The activities necessary to effectuate the Neville site cleanup are described in detail in several documents, most notably the Remedial Action Order and Final Remedial Action Plan. *See* Declaration of Harlan Jeche in Support of Plaintiff's Motion For Summary Judgment, Exs. A and B. Neville has not alleged that the cleanup was not performed, or that DTSC failed to oversee the cleanup.

because the time sheets clearly allocate costs by site and by category of activity.

2. Travel Expenses

Neville argues that DTSC's documentation of site-related travel is inadequate, because "no specific information is provided [on travel expense reports] as to what site related activities necessitated the particular travel expense." Johnson Suppl. Decl. ¶4. According to Neville, this may result in its being charged for travel expenses unrelated to the Neville site. As evidence that this has in fact occurred, Neville offers a memo dated April 14, 2000, documenting an attorney's trip from Sacramento to Glendale to meet with DTSC staff. Declaration of Dennis Byrne in Support of Neville's Supplemental Brief in Opp'n to Motion for Summ. Judg., Ex. D. The memo states that the purpose of the trip was to "meet with staff" regarding "Neville," "El Toro," "El Centro," "Angeles," and "Western Lead Products." *Id.* The full cost of the trip was apparently charged to Neville. Neville argues that the memorandum demonstrates the shortcomings of DTSC's accounting for travel, as well as documenting costs which were improperly allocated to it.

DTSC responds that regardless of which projects were discussed at the Glendale office, there is no evidence that the disputed travel was occasioned by anything other than the Neville discussion. DTSC also offers the declaration of its expert, Jeffrey Mahan, that when travel is occasioned by more than one site, DTSC allocates the costs among the different sites. Declaration of Jeffrey Mahan in Support of DTSC's Supplemental Brief in Support of Motion for Summ.

Judg. ("Mahan Suppl. Decl.") ¶6. The Court finds that a single alleged misallocation of travel expenses is not sufficient to create a material question of fact that DTSC's accounting practices with regard to travel expenses were so inadequate as to be arbitrary and capricious.[6]

3. Invoices

Neville argues that DTSC's charges between 1985 and 1996 are suspect because of "discrepancies . . . in different invoices DTSC issued for work performed during a given time period." Johnson Suppl. Decl. ¶ 5. In particular, Neville argues that invoice No. 12687, dated March 17, 1994, invoice No. 13058, dated August 23, 1996, and a Summary By Activity ("SBA") dated April 17, 1997, reflect different amounts for the same period of time. DTSC argues that the discrepancy in the amounts shown by the three documents is due to revisions in its calculation of indirect cost rates, and that the later dated invoices explicitly state that they supersede the earlier dated invoices. DTSC submits a letter, sent to Neville in conjunction with invoice No. 13058, which explains that the new invoice reflects revised indirect cost rates for the fiscal periods July 1987 through June 1996, and which explicitly instructs Neville to disregard invoice No. 12687 "since it has been superseded by enclosed invoice No. 13058." Mahan Decl., Ex. B at 56. Similarly, when DTSC provided the April 17, 1997 SBA to Neville, it enclosed a letter explaining that there had been adjustments

6. However, DTSC is instructed to properly allocate the travel expenses with regard to the trip described in the April 14, 2000 memorandum.

"which modify the previous SBA sent to you on August 26, 1996."[7] Mahan Suppl. Decl. ¶10, Ex. G. The April 17, 1997 SBA itself states that it "supersedes any previously issued SBA for the time periods noted." *Id.* The Court finds that Neville has not demonstrated a material question of fact that the discrepancies it points to in the invoices demonstrate that DTSC is improperly accounting for its costs.

4. Indirect Costs

Neville argues that DTSC has not adequately explained significant fluctuations in the indirect cost ratios ("ICRs") used to calculate the indirect costs charged to Neville. Neville's expert Johnson states that:

> It appears the indirect cost pool used in calculating the ICR ha[s] nearly doubled during the years 1989 through 1995. This ICR cost-pool inflation increased DTSC's overhead costs, which were used to calculate the ICR. DTSC provided no documentation to account for the significant fluctuations noted in ICR used to calculate the indirect costs charged to Neville.

Johnson Suppl. Decl. ¶ 6. DTSC responds that the NCP does not require it to speculate as to why the indirect cost pool has increased, but merely to document its methodology for calculating the ICR. DTSC calculates ICRs by dividing DTSC's indirect costs (i.e. overhead) by its total direct labor costs. ICRs are derived in accordance with "Indirect Cost

7. These adjustments consisted mainly of revisions to the rate for calculating indirect costs.

Rate Proposals" prepared by DTSC which set forth the data, formulas, and calculations used to arrive at every ICR. Mahan Suppl. Decl. ¶7, Ex. E (example of an ICRP). DTSC's methodology is in turn based on federal guidelines. *See id.* Ex. E (stating that the ICRP is prepared "in accordance with the requirements of the State and Federal OMB Circular A-87, 'Principles for State and Local Governments' "). The Court finds that Neville has not provided any evidence to support its claim that DTSC's indirect cost rates are not properly documented. *Cf. Chrysler Corp.*, 168 F.Supp.2d at 770 (conditioning government's recovery of indirect costs on its ability to produce "any formula supporting the calculation of indirect costs").

5. Bond Expenditures

Neville challenges two aspects of DTSC's costs related to its use of bond funds to pay for part of the Neville cleanup.[8] First, Neville argues that DTSC did not sufficiently explain why some direct labor costs were funded using bond funds while others were not. However, Neville provides no authority for its argument that DTSC must explain its decision to fund particular aspects of cleanup projects from bond funds as opposed to non-bond funds. DTSC has provided ample documentation of its use of bond funds, and of its

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8. DTSC has the option of funding part of its site mitigation costs through bonds issued by the State Treasurer's Office. Because interest on the bond funds must be paid to holders of the bonds, state law directs DTSC to recover this expense as a response cost. *See* Cal. Health & Safety § 25360.1. Accordingly, DTSC charges responsible parties for the bond interest on that portion of a site cleanup for which bond funds are utilized.

methodology for calculating bond interest, and the Court finds this sufficient to meet the requirements of 40 C.F.R. § 300.160(a)(1). Second, Neville argues that there are discrepancies in different DTSC documents showing the bond principal amount, from which bond interest is calculated. However, even according to Neville's calculations, these discrepancies are in the nominal amounts of $2.94 and $133.39. Johnson Suppl. Decl. ¶8. DTSC states that these discrepancies appear to be due to data-entry errors, and that the most recent SBA, which forms the basis for DTSC's present cost recovery claim, shows the correct amount. Mahan Supp. Decl. ¶12. The Court finds that these minor discrepancies, which appear to have been corrected, do not create a material question of fact as to the propriety of DTSC's accounting practices.

In sum, the Court finds that there is no material question of fact as to the proper documentation of DTSC's costs.

B. DTSC's Request For Interest and Attorneys' Fees

In its March 26, 2002 Order, the Court held that DTSC was entitled recover all properly documented cleanup costs, as well as interest on those costs, but did not grant summary judgment because there were outstanding issues concerning documentation of costs. Based on the conclusion set forth herein, the Court finds that Neville is entitled to interest on those costs and its reasonable attorneys' fees. *See Chapman,* 146 F.3d at 1175 (recoverable response costs include reasonable attorneys' fees for bringing cost-recovery litigation).

Appendix E

IV. CONCLUSION

For the reasons discussed above, plaintiff's motion for summary judgment is GRANTED as to defendant's liability for all disputed recovery costs. Plaintiff is also entitled to recover interest and reasonable attorneys' fees. The Court hereby orders plaintiff to prepare and file a form of judgment, consistent with this order, setting forth the exact amount of its recovery costs, and substantiating its claim for interest and attorneys' fees.

IT IS SO ORDERED.

Dated: May 8, 2002

s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

APPENDIX F — ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION FILED MARCH 26, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVSION

Case No. CV-00-10205 CAS (Ex)

STATE OF CALIFORNIA, on behalf of the California Department of Toxic Services,

Plaintiff,

vs.

NEVILLE CHEMICAL COMPANY, a corporation; and DOES 1-10,

Defendant.

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

This case is a cost-recovery action brought by plaintiff State of California on behalf of the Department of Toxic

Substances Control ("DTSC")[1] under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* DTSC seeks to recover costs associated with the cleanup of hazardous substances at a chemical manufacturing plant owned and operated by defendant Neville Chemical Company ("Neville"). The parties are now before the Court on DTSC's motion for summary judgment.

II. FACTS

A. Background

Neville is the owner and operator of a 3.5 acre industrial facility in Santa Fe Springs, California (the "site"). Compl. ¶6. From 1952 to approximately 1987, Neville manufactured chemical compounds for use in insecticides, solvents, metalworking lubricants and flame retardants at the site. *Id.* ¶8. Investigations at the site found that the soil and groundwater were significantly contaminated with hazardous substances from Neville's past handling, storage and disposal practices. *Id.* ¶11. In 1986, DTSC[2] ordered Neville to clean up the site pursuant to a Remedial Action Order ("RAO"). Declaration of Harlan Jeche in Support of Pl's. Mot. for Summ. Judg. ("Jeche Decl.") ¶9. The RAO required Neville to prepare a remedial investigation and feasibility study

1. The Court will refer to plaintiff as DTSC.

2. DTSC was a division of the California Department of Health Services ("DHS") until it became a separate department sometime in 1991. For ease of reference, the Court will utilize the term DTSC throughout.

("RI/FS"), and a remedial action proposal ("RAP"), both in accordance with the National Contingency Plan ("NCP"). *Id.*, Ex. B at 174 (RI/FS), 181(RAP). According to the terms of the RAO, Neville would then have to implement the RAP, and would be responsible for all operation and maintenance requirements of the RAP until the remediation goals of the RAP were met. *Id.*, Ex. B at 182. The RAO contains a provision for recovery of certain costs pursuant to state law. *Id.*, Ex. B at 188.

DTSC alleges that its employees have spent thousands of hours since 1985 responding to releases and threatened releases of hazardous substances at the Neville facility, and overseeing Neville's own response measures. Jeche Decl. ¶10. The response measures undertaken at the Neville facility include: the removal of twenty one drums containing dichlorobenzenes, carbon tetrachloride, and chlorinated paraffins that had been illegally buried at the site; recontouring the soil and capping it with asphalt; installing a groundwater extraction-and-treatment system; and recording a deed restriction to prevent future uses of the site which would be harmful to humans and the environment. *Id.* ¶11. DTSC alleges that as of September 30, 2001, its response costs for the Neville facility total $759,368.29, exclusive of interest and attorneys' fees.[3]

B. Cost Recovery

In April 1985, DTSC filed suit against Neville in Superior Court for the County of Los Angeles. The relief sought in

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3. This total includes a $46,636.38 "activity fee" that Neville has already paid to DTSC.

that action included the recovery of costs pursuant to California Health and Safety Code Section 25360 ("Section 25360"). Declaration of Dennis J. Byrne in support of Neville's Opp'n to Mot. for Summ. Judg. ("Byrne Decl."), Ex. A. Section 25360 provides:

> Any costs incurred and payable from the state account [the Hazardous Substance Account] shall be recovered by the department from the liable person or persons. In addition, such person or persons shall be liable to the department for administrative costs actually incurred, or five hundred dollars ($500), whichever is greater. The amount of costs determined pursuant to this section shall be recoverable in a civil action.

On December 10, 1986, DTSC issued the RAO to Neville, instructing it to conduct an RI/FS, and prepare and implement an RAP. Section III of the RAO stated a number of conclusions of law, which were based upon the application of California law. Byrne Decl., Ex. C at 16. Section 8.16 of the RAO, entitled "Cost Recovery," provided that

> Failure or refusal of [Neville] to comply with this Order may make [Neville] liable for any government costs incurred, including those payable from the Hazardous Substance Cleanup Fund for any remedial action at the site, as provided in Section 25360 of the Health and Safety Code and other applicable provisions of law. These costs include DHS's direct costs and DHS's administrative overhead costs in an amount

> equal to 10 percent of the reasonable cost actually incurred, or five hundred dollars ($500), whichever is greater. In addition, [Neville] may be liable for the costs of oversight by DHS of [Neville's] activities at the site as provided in Section 25360 of the Health and Safety Code. Respondents may also be liable to the Department for punitive damages up to three times the amount of any costs incurred by the state account pursuant to Section 25359 of the Health and Safety Code.

Id., Ex. C at 32.

On January 30, 1987, Angelo Bellomo, Chief of the Southern California Section of DTSC, wrote to Neville informing it that the Neville facility had been listed on the Hazardous Substance Cleanup Bond Act Expenditure Plan as a site requiring assessment and cleanup action. *Id.*, Ex. D. Attached to the correspondence was a document entitled "Detailed Site Expenditure Plan Neville Chemical Company." In a section entitled "Projected Revenue Sources," the document lists Neville as a responsible party, and then states that "it appears at this time that it may be necessary to utilize bond funds to remediate this site. If bond funds are expended, the Department will undertake cost recovery action." *Id.* The document then sets forth estimated costs for DTSC's cleanup of the site, to be "funded from bond sale proceeds (to the extent that Federal Superfund or responsible party funding in not available)." *Id.* The estimated costs are listed as $265,000 for site characterization, $60,000 for remedial action plan, and $1,110,000 for remedial action. *Id.*

Appendix F

In January 1987, Neville's Vice President and General Counsel, Thomas McKnight, attended a meeting with representatives of DTSC to discuss the RAO. According to McKnight:

> At this meeting DTSC threatened legal action against Neville pursuant to Sections 8.15 and 8.16 of the RAO if Neville failed to fully comply with the RAO. At this meeting, DTSC specifically represented to Neville that it would not be subject to cost recovery litigation if it agreed to voluntarily and fully comply with the RAO. DTSC indicated that they were prepared to perform the site assessment required under the RAO if Neville refused to cooperate.

Byrne Decl., Ex. E, McKnight Decl. ¶6.

In September 1987, DTSC approved the workplan Neville submitted for the remedial investigation of the site. McKnight Decl. ¶13. On February 19, 1988, DTSC dismissed its pending cost recovery claim against Neville in the Superior Court for the County of Los Angeles. Byrne Decl., Ex. G.

In 1989, the California legislature enacted Chapter 269, 1989 Cal. Stats. Ch. 269, which amended portions of the Health and Safety Code to restructure state funding of the cleanup of hazardous waste sites. Chapter 29 did not amend the cost recovery provisions of Section 25360. However, pursuant to the new legislation, DTSC initiated a program whereby it assessed an "activity fee" program intended to partially cover DTSC's oversight costs in circumstances

where a responsible party such as Neville was conducting the actual investigation and remedial activity at a site.

On September 29, 1989, Dennis Dickerson, Regional Administrator for DTSC, sent Neville a letter explaining the activity fee program and assessing an initial activity fee of $46,636.38 for the RI/FS phase of the project. Jeche Decl., Ex. C. The letter reads in relevant part:

> The Department of Health Services (Department) has identified you as the party primarily responsible for taking action to characterize and remedy the public health and/or environmental threats posed by the uncontrolled release of hazardous substances at [the Neville site]. Pursuant to legislation (Chapter 269, Statutes of 1989) which was recently signed into law by the Governor, you are obligated to pay activity fees beginning July 1, 1989, to partially cover the Department's cost of overseeing your action to characterize and satisfactorily remediate this site.
>
> Chapter 269 sets out specific fees for the various phases of activity associated with characterizing and abating hazardous substance release sites based on the relative size of each site as estimated by the Department. . . . For purposes of establishing a fee for the current phase of activity being conducted at the Neville Chemical Company, the Department has made a preliminary determination that the site is a large as defined by Chapter 269. However, the law does provide for

a separate fee ($5,000) to have the Department undertake a study to more accurately determine site size. If you wish to have the Department undertake such a study and pay the additional $5,000 fee you should advise me immediately. In making this decision you should be aware that the law does allow the Department to make adjustments to initial site size determinations so that fee levels may be raised or lowered for subsequent phases of activity based on additional data. However, the law does not allow for retroactive application of such adjustments.

Another feature of Chapter 269 is the proration of fees for phases of investigation and cleanup activity that were underway when the new law took effect on July 1, 1989. Basically, the law says that any identified costs borne by the Department for oversight of an activity which occurred prior to July 1, 1989, will be cost recovered and that the Department must prorate the fee to be assessed for this phase based either on the amount of work completed as of July 1, 1989, or based on the amount of work left to be completed as of that date as estimated by the Department and based on the guidelines established by Chapter 269.

The Department estimates that it will take 18 months to complete the Remedial Investigation/ Feasibility Study that was underway at the site on July 1, 1989. Based on the Department's preliminary determination that this site is a large,

> and the monthly fee quotient is $2,590.91, the prorated fee for this phase of activity is, therefore, $46,636.38.
>
> Chapter 169 requires the State Board of Equalization (Board) to collect the fees established by the Department under the Act. You may expect to receive a demand from the State Board in the near future based on the fee levels described herein. As each phase of activity associated with a fee is completed at the site, a demand for the fee that is associated with the next phase of activity will be sent to you by the State Board. In cases where fees are not paid promptly, the State Board is empowered to seize personal as well as business assets and take other enforcement actions to ensure payment.

Id. In response to the Dickerson letter, Neville promptly paid the activity fee. McKnight Decl. ¶17.

In conjunction with the implementation of the activity fee program, DTSC issued policy statements to the effect that where a responsible party was complying with the RAO and conducting its own remediation efforts, the activity fee would be the full extent of cost recovery sought by DTSC. For example, DTSC Management Memo 91-1 dated April 17, 1991, states:

> Chapter 269, Statutes of 1989, established an activity fee program which partially covers the Department's cost of overseeing hazardous

> substance release site investigation and cleanup activities. Under the fee legislation, responsible parties are generally liable for the Department's full cost for performing oversight activities prior to July 1, 1989 when the fee program took effect. For oversight activities conducted after July 1, 1989, responsible parties are expected to pay the activity fees. Although current law (H & SC 25360) continues to provide authority for full cost recovery after giving credit for any activity fees paid, it continues to be the Department's policy (per OPP # 90-1)[4] to only collect direct program expenditures (generally laboratory or contract expenditures) beyond activity fees in cases where the responsible parties are being cooperative.

Byrne Decl., Ex. H; *see also* Pollak Decl., Ex. B.

On April 27, 1992, DTSC issued Management Memo # 91-9, in which it determined that its previously stated policy limiting cost recovery from cooperating responsible parties to the payment of their activity fees "is in conflict with the

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4. OPP # 90-1 is a Toxic Substances Control Program Cost Recovery Policy and Procedure manual dated March 1990. The manual provides that cost recovery will be pursued against responsible parties who are conducting their own remediation activities only in extraordinary circumstances including, *inter alia*, violation of an RAO, failure to pay activity fees, unapproved delays in cleanup schedules caused by the responsible party, and submission of poor quality workplans and/or work products. *See* Declaration of Harrison Pollak in support of Pl's. Mot. for Summ. Judg. ("Pollak Decl."), Ex. B at 40.

provisions of H & SC 25360 which essentially requires DTSC to attempt to recover all identified Hazardous Substances Account/bond expenditures." Byrne Decl., Ex. I. The memorandum then announced that "the policy reflected in OPP # 90-1 . . . regarding the acceptance of fees as full compensation for oversight costs is rescinded immediately." *Id.* Finally, the memorandum stated that

> since there has been no hiatus in the cost recovery requirements of H & SC 25360, [responsible parties] will be liable for all costs identified, in excess of fees paid beginning July 1, 1989, which is the date of inception of the fee program. This revision provides for full cost recovery regardless of whether DTSC has determined that a [responsible party] is recalcitrant.

Id.

On September 21, 2000, DTSC filed a complaint seeking (1) recovery of response costs already incurred by DTSC in conjunction with the cleanup of the Neville site, including interest and attorneys' fees, and (2) a declaration that Neville would be responsible for any future DTSC response costs incurred at the Neville site.

II. LEGAL STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden

of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed.R.Civ.P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 888 (1990). *See also Celotex Corp.,* 477 U.S. at 324, 106 S.Ct. 2548. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. *See also Abromson v. American Pacific Corp.,* 114 F.3d 898, 902 (9th Cir.1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 631 & n.3 (9th Cir.1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E.*

Rouse & Co., 121 F.3d 1332, 1335 (9th Cir.1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita*, 475 U.S. at 587.

III. DISCUSSION

A. *Prima Facie Liability Under CERCLA*

To establish a *prima facie* case for liability under CERCLA, DTSC must prove: (1) the site is a "facility"; (2) a "release" or "threatened release" of a hazardous substance occurred; (3) DTSC incurred costs in responding to the release or threatened release; and (4) the defendant falls within one of the four classes of responsible persons defined by the statute. 42 U.S.C. § 9607(a); *United States v. Chapman*, 146 F.3d 1166, 1169 (9th Cir.1998). Once DTSC has established a *prima facie* case, the burden shifts to Neville to prove that DTSC's action in response to the CERCLA violation was inconsistent with the NCP, *id.*, or to assert affirmative defenses.

DTSC argues that it has made out a *prima facie* case for Neville's liability on undisputed evidence. CERCLA defines a "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. . . ." 42 U.S.C. § 9601(9). DTSC argues, and Neville does not deny, that CERCLA-defined hazardous substances, including dichlorobenzenes, polychlorinated debenzodioxins, polychlorinated dibenzofurans, chloroform, copper, zinc, and lead, have been detected at the Neville site. *See* 40 C.F.R.,

Part 302.4 (designation of CERCLA hazardous substances); Jeche Decl. ¶17 (describing substances found at the Neville site). Therefore, it is undisputed that the Neville site is a "facility" as defined by CERCLA.

CERCLA defines a "release" as ". . . any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment. . . ." 42 U.S.C. § 9601(22). Neville admits that there have been releases or threatened releases of hazardous substances into the environment from the Neville facility. Amended Answer, ¶¶6, 16. The RAP also confirms that hazardous substances were detected in the soil, groundwater, surface water, and air at the Neville site, and identifies potential sources of those releases. Jeche Decl. ¶¶7-8, Ex. A at 36. Thus, it is undisputed that there was a release of hazardous substances at the Neville facility.

The third element of CERCLA liability is that the party seeking to recover costs must have incurred them in response to the release of hazardous substances at a facility.[5] "Response" is defined as "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25). CERCLA defines these terms to include the cleanup or removal of released hazardous substances from the environment, actions taken

5. CERCLA holds responsible parties liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe *not inconsistent with the national contingency plan.*" 42 U.S.C. § 9607(a)(4)(A) (emphasis added). However, "failure to comply with the NCP is not a defense to liability, but rather a factual issue affecting damages." *Washington State Dept. of Transportation v. Washington Natural Gas Co. ("WSDOT")*, 59 F.3d 793, 798 (9th Cir.1995).

in the event of the threat of release of hazardous substances, actions to monitor, assess and evaluate the release or threatened release of hazardous substances, the disposal of removed material, and actions consistent with a permanent remedy. 42 U.S.C. § 9601(23)-(24). Response costs recoverable under CERCLA include oversight costs incurred by a government agency in an effort to ensure that a site is being adequately investigated and remediated by responsible parties. *State of California v. Celtor Chemical Corp.*, 901 F.Supp. 1481, 1489-90 (N.D.Cal.1995); *State of California v. SnyderGeneral Corp.*, 876 F.Supp. 222, 224-25 (E.D.Cal.1994). Recoverable response costs also include reasonable attorneys' fees for bringing cost-recovery litigation, as well as indirect costs, or overhead. *Chapman*, 146 F.3d at 1175 (attorneys' fees); *United States v. R.W. Meyer*, 889 F.2d 1497, 1503 (6th Cir.1989) (indirect costs). DTSC contends, as discussed above, that its employees have spent thousands of hours since 1985 responding to the releases of hazardous substances at the Neville site. DTSC also contends that attorneys in the State Attorney General's Office have spent more than one thousand hours litigating the present case. Declaration of Laurie Pearlman ("Pearlman Decl.") ¶7, Pollak Decl. ¶5. In a response to an interrogatory, Neville conceded "that DTSC has incurred costs in overseeing the investigation and remediation of environmental contamination associated with the Neville site." Pearlman Decl., Ex. A at 30:3-4. Accordingly, DTSC has established the third element of CERCLA liability.[6]

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6. The Court will consider below both Neville's assertion that DTSC should be barred from recovering any costs associated with the Neville site, and its narrower challenge to the propriety and validity of some of the specific response costs put forward by DTSC.

Appendix F

The final element of liability under CERCLA is that Neville falls within one of the four classes of statutorily defined responsible parties. DTSC argues that Neville is liable under at least two of these categories as (1) "the owner and operator of a vessel or facility"; and (2) "any person [including corporations] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed [.]" 42 U.S.C. § 9607(a)(1)-(2).[7] Neville admits that it has owned and operated the Neville facility since 1952. Amended Answer ¶¶6,9. It also admits that it owned and operated the facility at the time of the disposal of hazardous substances. *Id.* ¶ 16. Therefore, Neville is liable under CERCLA as the owner and operator of the Neville facility.

In sum, DTSC has established the four elements of a *prima facie* case for CERCLA liability against Neville. The burden therefore shifts to Neville to refute its liability.

B. *Defenses to Liability Under CERCLA*

Neville asserts six affirmative defenses to CERCLA liability in the Amended Answer. These defenses are: (1) failure to state recoverable CERCLA costs; (2) payment as satisfaction; (3) plaintiff's costs [are] inconsistent with the NCP; (4) statute of limitations; (5) acts or omissions of third parties; intervening and superseding acts; and (6) no CERCLA hazardous substances [were present at the site]. Amended Answer at 5-6.

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7. The other two statutory categories refer to persons who arranged for disposal or treatment of hazardous substances at the facility, and to transporters of hazardous wastes to the facility. 42 U.S.C. § 9607(a)(3)-(4).

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Neville's first, third, fifth and sixth affirmative defenses do not rebut DTSC's *prima facie* case of liability. Neville's first and third affirmative defenses challenge only whether particular costs incurred by DTSC are recoverable, and are therefore not defenses to liability. *See WSDOT,* 59 F.3d at 798 ("failure to comply with the NCP is not a defense to liability, but rather a factual issue affecting damages"). Neville's fifth affirmative defense parallels the language of CERCLA's "innocent landowner" defense, which provides a statutory defense to liability where the release of hazardous substances was due to

> an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant [].

42 U.S.C. § 9607(b)(3). In order to be able to assert this innocent landowner defense, the statute provides that a party must also demonstrate, by a preponderance of the evidence, that

> (a) [it] exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) [it] took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Id. The defense is unavailable to anyone who contributed, actively or passively, to the release of a hazardous substance at a site. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 887 (9th Cir.2001) (en banc). Neville has provided no evidence of the involvement of a third party at the Neville site to whom the release of hazardous substances could be attributed. Furthermore, Neville has not presented evidence which, even when considered in the light most favorable to Neville, would establish that it did not contribute in some way to the release of hazardous substances at the Neville site. Therefore, Neville cannot prevail on its fifth affirmative defense.

Neville's sixth affirmative defense is also not available here, because Neville has admitted that "there have been releases, or threatened releases, of hazardous substances into the environment" from the Neville facility. Amended Answer ¶6.[8]

Neville's second affirmative defense is based on its contention that actions taken by the parties limit DTSC's recovery to the $46,636.38 activity fee which Neville has already paid. Although this defense is entitled "payment as satisfaction" in Neville's amended answer, in its opposition to the present motion Neville recasts its defense as an argument that DTSC should be barred from recovery because (1) it acted in an arbitrary and capricious manner and (2) its claims are subject to equitable estoppel. DTSC contends that Neville's attempt to assert equitable defenses to liability fails

8. The RAP for the site prepared by Neville also supplies indisputable evidence of the presence of hazardous substances at the Neville facility. *See* Jeche Decl., Ex. A at 35-49.

as a matter of law because CERCLA limits available affirmative defenses to those enumerated in the statute. Congress imposed strict, but not absolute, liability under CERCLA. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir.1986). Statutorily defined responsible parties are liable for releases or threatened releases of a hazardous substance "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in [42 U.S.C. § 9607(b)]." 42 U.S.C. § 9607(a). The affirmative defenses set forth in 42 U.S.C. § 9607(b) are that the release of a hazardous substance was "caused solely by (1) an act of God; (2) an act of war; (3) the 'innocent landowner' defense set forth above; or (4) any combination of the foregoing. . . ." The Ninth Circuit has concluded that these statutory affirmative defenses are intended to be exclusive. *See Levin Metals*, 799 F.2d at 1317 ("in order to state a claim for a declaration of nonliability, the declaratory judgment plaintiff *must* base its claim of nonliability on one or more of [42 U.S.C. § 9607(b)'s] statutory affirmative defenses") (emphasis added); *see also United States v. Shell Oil Co.*, 1992 WL 144296, *2 (C.D.Cal.1992) ("this Court must conclude that for the purposes of [liability under § 9607(a)] of CERCLA, only the enumerated defenses will be recognized"). Other courts have specifically held that equitable defenses cannot be used to preclude liability under § 9607(a) of CERCLA. *See Shell Oil*, 1992 WL 144296 at *8 (defendant's asserted equitable defenses of estoppel, waiver, laches, and unclean hands must be stricken because the language of § 9607(a), which provides for CERCLA liability "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b),"

clearly demonstrates that CERCLA's enumerated affirmative defenses are exclusive); *United States. v. Stringfellow,* 661 F.Supp. 1053, 1062 (C.D.Cal.1987) (accord). Accordingly, the Court finds that Neville's second affirmative defense to CERCLA liability, whether characterized as payment having been satisfied or as equitable estoppel, is unavailable because it is not one of the enumerated affirmative defenses set forth in 42 U.S.C. § 9607(b).[9]

Neville's fourth affirmative defense is that DTSC's cost recovery action is barred by the statute of limitations.[10] Neville argues that DTSC's complaint is not timely because it was not filed "within 6 years after initiation of physical on-site construction of the remedial action" as required by CERCLA. 42 U.S.C. § 9613(g)(2)(B). The complaint was

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9. Neville also attempts to raise DTSC's alleged arbitrary and capricious conduct as a defense to liability. However, this is a misapplication of the arbitrary and capricious conduct standard, which is employed to measure the consistency of particular cleanup actions with the NCP, and therefore goes to the question of what costs the government is entitled to recover as damages rather than to the question of liability. *See WSDOT,* 59 F.3d at 798 (holding that WSDOT was not entitled to recover response costs under CERCLA where its actions in connection with an environmental cleanup were inconsistent with the NCP to such a high degree as to be arbitrary and capricious, but also stating that "failure to comply with the NCP is not a defense to liability, but rather a factual issue affecting damages").

10. The evidence presented by the parties in regard to Neville's statute of limitations defense is set out more fully in the Court's December 18, 2001 Minute Order denying Neville's motion for summary judgment.

filed on September 21, 2000, and is therefore barred by the statute of limitations if on-site construction of the remedial action was initiated before September 21, 1994. The applicability of the statute of limitations here depends of whether the start of construction of groundwater extraction wells, which the parties agree took place in April 1994, formed part of a "removal" action or a "remedial" action prior to September 21, 1994.

CERCLA defines attempts to clean up environmental contamination as either removal or remedial actions. A removal action is defined as

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous materials into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23). A remedial action is defined as

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to

> prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601(24). The difficulty presented by these two definitions is that they both may cover the same activity. *See Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 926 (5th Cir.2000) ("the CERCLA definitions [of removal and remedial] are expansive enough that certain activities may well be covered by both"); *Public Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir.1999) ("Elements of either response action may overlap and semantics often obscure the actual nature of the cleanup performed.").

Advanced Micro Devices v. National Semiconductor Corporation, 38 F.Supp.2d 802, 812 (N.D.Cal.1999), provides some guidance on the question of when an action should be considered a remedial action for purposes of the CERCLA statute of limitations. *Advanced Micro Devices* concerned a situation quite similar to the instant case. Extraction wells initially drilled by plaintiff at its facility in 1986 as part of an "interim remediation program" were eventually incorporated into the final remedial plan for the site in September 1991. *Id.* at 806-07. A CERCLA cost recovery suit for contribution was filed in September 1997. *Id.* at 807. The court considered whether the initial installation of the wells constituted a remedial action which would trigger CERCLA's six-year statute of limitations. Plaintiff argued that no remedial action could take place until a final remedial plan had been officially approved. *Id.* at 811. The court rejected that bright-line test in favor of an analysis

of the proximity of the action to the "disclosure of the final remedial design, which may occur prior to approval of the final remedial plan." *Id.* at 812; *see also State of California v. Hyampom Lumber Co.*, 903 F.Supp. 1389, 1393 (E.D.Cal.1995) (holding that a draft RAP constituted a final remedial design); *Geraghty and Miller,* 234 F.3d at 927 (actions cannot be classified as remedial when "Louisiana Department [of Environmental Quality] had yet to issue its final decision, and only that decision will define the ultimate remedial strategy"). The *Advanced Micro Devices* court concluded that the extraction wells could not have been "remedial" in 1986 because there was no final remedial design until 1991. *Id.* The court observed that a remedial design could not be considered final while "different alternatives for final remedial action were still being evaluated." *Id.* at 812. The court addressed the fact that the extraction wells were adopted without modification as part of the final groundwater treatment system by noting "the system could not, upon its installation, have 'played a critical role in the implementation of the permanent remedy,' because the permanent remedy was not determined until four years later. . . . The fact that the extraction activities ultimately did not turn out to be 'short-term,' because they were implemented in the final remedy four years later, cannot now be considered in hindsight." *Id.* at 813 (citing *Hyampom Lumber,* 903 F.Supp. at 1393).

In the instant case, Neville argues that the remedial action was initiated in April 1994, when it began construction of the extraction wells.Neville argues that a plan for a "Groundwater Removal Action," ("GRA") approved in April 1993, is identical in all respects to the final remedial plan.

Additionally, Neville alleges that DTSC never considered a more aggressive strategy for addressing groundwater contamination on the site than that embodied in the GRA. DTSC argues that although the final RAP for groundwater is essentially the same as the GRA, other options for the treatment of groundwater were evaluated, and there was no guarantee in April 1994 that the final remedial plan would take the form that it did. DTSC presents evidence that diverse solutions to the groundwater contamination problem were still being discussed in Neville's draft FS in December 1994, and that the parties were still considering changes in the groundwater plan up until the RAP was finalized in May 1995. DTSC also offers evidence that, at least as late as an October 6, 1994 letter to Neville, it was insisting that further sampling and monitoring was necessary before the wells proposed in the GRA could be considered the final remedial solution for groundwater at the site. Neville has presented no countervailing evidence. Therefore, the Court finds there is no material question of fact that a final remedial design was not in place on September 21, 1994. Accordingly, the CERCLA statute of limitations does not bar DTSC's cost recovery claim.

In sum, Neville cannot prevail on any of its affirmative defenses. Thus, DTSC has established a *prima facie* case of CERCLA liability against Neville and is entitled to recover all response costs which are not inconsistent with the NCP. In addition, DTSC is entitled to a declaration that Neville is liable for all of DTSC's future response costs not inconsistent with the NCP.

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C. *Inconsistency with the NCP*

Response actions undertaken by a federal or state governmental entity, or an Indian tribe, are presumed to be consistent with the NCP. *WSDOT*, 59 F.3d at 799-800. Thus, when a governmental body such as DTSC seeks to recover its costs, it is the defendant's burden to prove that a particular government action is inconsistent with the NCP in order to preclude the government from recovering the costs of taking that action. *Id.* at 800. In order to meet this burden of proof, the defendant must show that the government's particular action was arbitrary and capricious. *Id.* at 803; 42 U.S.C. § 9613(j)(2).

Here, Neville argues that DTSC's actions are inconsistent with the NCP in two ways. First, as discussed above, Neville argues that DTSC acted in an arbitrary and capricious manner when it allegedly represented that it would not seek cost recovery against Neville, but later did so. Second, Neville argues that DTSC has offered insufficient evidence to support the recovery of some of its claimed costs. The Court will consider each of these arguments below.

1. DTSC's Alleged Representations That It Would Not Seek Cost Recovery.

Neville argues that certain statements and actions by DTSC constituted representations that DTSC would not seek cost recovery from Neville. Neville further argues that these representations render DTSC's decision to pursue full cost

recovery arbitrary and capricious.[11] In particular, Neville argues that: (1) the record demonstrates that DTSC offered to dismiss existing cost recovery actions, and to forego future cost recovery actions, in exchange for Neville's voluntary compliance with the RAO, including Neville's commitment to remediate the Neville site; and (2) Neville's payment of the activity fee assessed by DTSC was, pursuant to DTSC's own policy at that time, a full satisfaction of Neville's obligation to pay remediation costs for the Neville site, and DTSC's later policy change, which resulted in the retroactive imposition of full cost recovery on Neville, was arbitrary and capricious.

As a preliminary matter, DTSC argues that, even if it acted in the way that Neville describes, these actions are irrelevant to the question of whether DTSC has complied with the NCP. The NCP "provide[s] the organizational structure and procedures for preparing for and responding to . . . releases of hazardous substances." *WSDOT* 59 F.3d at 799 (quoting 40 C.F.R. § 300.1). It "identifies methods for investigating the environmental and health problems resulting from a release or threatened release and criteria for determining the appropriate extent of response activities." *Id.* (quoting *Matter of Bell Petroleum Servs.*, 3 F.3d 889, 894 (5th Cir.1993)). The NCP does not set forth particular

11. Many of Neville's arguments are phrased in terms of equitable estoppel—i.e. that DTSC should be equitably estopped from pursuing cost recovery because of its alleged representations that it would not do so. However, given the standard by which compliance with the NCP is judged, for present purposes the Court will construe these arguments as arguments that DTSC acted in an arbitrary and capricious manner.

procedures for governmental agencies to follow in pursuing cost recovery. DTSC argues that it is the government's response actions, and not the cost of such actions, that should be analyzed for compliance with the NCP. *See United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir.1992) ("CERCLA § 107(a)(4)(A) does not limit the government's recovery to 'all reasonable costs;' rather, it permits the government to recover 'all costs of removal or remedial action incurred . . . not inconsistent with the [NCP].' [citation omitted] The NCP regulates choice of response actions, not costs. *See* 40 C.F.R. § § 300.65, 300.68 (1989). Costs, by themselves, cannot be inconsistent with the NCP. Only response actions—i.e., removal or remedial actions—can be inconsistent with the NCP, which can be demonstrated by a showing that the government's choice of response action was arbitrary and capricious."). DTSC therefore argues that any conduct in regard to recovery of costs is consistent with the NCP so long as the underlying actions and investigations for which DTSC seeks to recover costs were consistent with the NCP.

In support of its argument that DTSC's conduct in regard to cost recovery was arbitrary and capricious and thus inconsistent with the NCP, Neville relies on two decisions in *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F.Supp. 1421 (E.D.Cal.1993) ("*LP I*"); 842 F.Supp. 1243 (E.D.Cal.1994) ("*LP II*"). In *LP I*, the court suggested that the United States Environmental Protection Agency ("EPA") might have acted in an arbitrary and capricious manner by duplicating a private party's remedial investigation of a site. In *LP II*, the same court found that summary judgment as to Louisiana Pacific's ("LP's") liability for particular costs was inappropriate because some of the EPA's alleged duplicative

actions may have been in retaliation for LP's refusal to sign a consent decree, and therefore were potentially a violation of LP's constitutional rights. The Court finds that there may be circumstances where the government's conduct in attempting to recover its costs is arbitrary and capricious and thus inconsistent with the NCP.

In the alternative, DTSC argues that even if the Court assumes that the conduct alleged by Neville can potentially create a claim for inconsistency with the NCP, Neville still has not raised a triable issue of fact that DTSC's conduct in regard to cost recovery was arbitrary and capricious.[12] The gravamen of Neville's claim of arbitrary and capricious conduct is that DTSC's actions and policies misled Neville into believing that it would not be held liable for additional response costs if it complied with the RAO and paid the activity fee.[13] DTSC argues that: (1) the record shows that there was no agreement between the parties that DTSC would completely forego cost recovery in exchange for Neville's compliance with the RAO; (2) the policy changes relating to the activity fee paid by Neville were not arbitrary and capricious because at all times DTSC retained statutory

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12. DTSC also argues that *LP I* and *LP II* are distinguishable from this case. According to DTSC, Neville has not argued, let alone produced evidence, that DTSC pursued any action, such as the duplicative investigation in *LP I*, which created additional or unnecessary costs. Furthermore, DTSC argues, Neville has made no allegation which raises constitutional questions such as the ones posed by the EPA's alleged retaliation in *LP II*.

13. This conduct also forms the basis for Neville's defense of equitable estoppel.

authority to pursue full cost recovery, and (3) in any event, the activity fee paid by Neville only applied to costs associated with the RI/FS phase of the project and therefore, at a minimum, DTSC is entitled to summary judgment as to all other costs.

a. Compliance With the RAO

Neville argues that DTSC repeatedly represented that it would not pursue cost recovery actions unless Neville failed to comply with the RAO. DTSC responds that the evidence offered by Neville merely demonstrates that it was DTSC's policy to allow responsible parties to conduct cleanup efforts at their own expense under DTSC supervision and oversight, rather than conducting the entire cleanup itself and subsequently seeking cost recovery from the responsible party for the whole cost of that cleanup. In addition, DTSC argues that none of its statements or actions could be construed as suggesting that Neville would not be ultimately liable for DTSC's oversight costs. The Court will consider these arguments below.

First, Neville argues that the statement contained in the RAO to the effect that Neville may be liable for DTSC's "direct costs and . . . administrative overhead costs," if it fails to comply with the RAO, Byrne Decl., Ex. C at 32, implies that Neville would not be liable for cost recovery in the event it complied with the RAO. By contrast, DTSC argues that it did not waive the right to pursue recovery of its oversight costs since the RAO goes on to provide that Neville "may be liable for the costs of oversight" regardless of compliance with the RAO. *Id.* Neville also argues that at

a January 1987 meeting, DTSC allegedly represented to Neville's General Counsel that Neville would not be subject to cost-recovery litigation if it "voluntarily and fully compl[ied] with the RAO." McKnight Decl. ¶6. DTSC responds that the context of these discussions, which included DTSC's statement that it was "prepared to perform the site assessment required under the RAO if Neville refused to cooperate," *id.*, shows that DTSC's promise to forego cost recovery applied only to costs that it would have incurred if it had been forced to assume complete responsibility for the cleanup of the site due to Neville's noncompliance with the RAO. A similar argument is made by the parties with respect to the January 30, 1987 letter of Angelo Bellomo. Neville argues that Bellomo's statement—"[I]t appears at this time that it may be necessary to utilize bond funds to remediate this site. If bond funds are expended, the Department will undertake cost recovery action."—implies that DTSC would not pursue cost recovery if Neville complied with the RAO. DTSC, by contrast, argues that the context of Bellomo's statement is clearly one in which DTSC may be forced to step in and conduct actual remediation of the site, rather than merely overseeing Neville's efforts. Once again, DTSC argues that there is no evidence in Bellomo's statements that DTSC is waiving the right to recover its oversight costs.

Neville argues that, given the foregoing communications, the agreement between Neville and DTSC that Neville would proceed with the cleanup itself, as embodied in the workplan for remedial investigation prepared by Neville and approved by DTSC, constituted a "deal" that Neville would comply with the RAO and DTSC would forego future cost recovery. Neville argues that DTSC's dismissal of its then existing cost

recovery claims in state court is further evidence of that deal. DTSC responds that by approving Neville's workplan, all it did was provisionally agree to let Neville conduct the cleanup, thereby avoiding the necessity of having to undertake the cleanup itself, and the direct costs that it would have incurred had it been obliged to do so. According to DTSC, its dismissal of the complaint merely acknowledged that it would not be incurring the aforesaid direct costs.[14] Thus, DTSC argues, neither its approval of the workplan, nor its dismissal of its state court cost recovery claim, demonstrates that it did not intend to recover its oversight costs at some future point.

At the March 11, 2001 hearing on the present motion, DTSC argued that Neville's payment of an activity fee in conjunction with the RI/FS phase of the cleanup, and its acknowledgment that it "understood . . . that Neville could expect an additional Activity Fee to be assigned for subsequent phases of work," McKnight Decl. ¶16, demonstrated that Neville knew that compliance with the RAO did not completely excuse its obligation to pay.[15] Neville did not attempt to rebut this argument. In addition, when questioned at the hearing about the extent to which Neville was challenging costs, Neville's counsel stated that it was not disputing all costs, but only those associated with the RI/FS phase of the project, for which Neville had paid

14. DTSC also notes that the complaint was dismissed without prejudice.

15. Neville's payment of the activity fee occurred sometime after September 29, 1989, and the alleged deal between the parties excusing Neville from future payment is based on statements made and actions taken in 1987 and 1988.

an activity fee.[16] Consequently, Neville has conceded that it is responsible for some costs and, given that concession, it cannot prevail on its argument that there was an understanding between the parties that it would not be responsible for any costs so long as it complied with the RAO. Therefore, DTSC is entitled to recover all costs not associated with the RI/FS phase of the cleanup of the Neville site, to the extent that DTSC's claims for those costs are properly supported.[17]

b. Activity Fee Policy

Neville also argues that DTSC's actions and policies in regard to the assessment of an activity fee were arbitrary and capricious. Neville argues that DTSC represented that as long as Neville complied with the RAO, DTSC would not pursue cost recovery for the RI/FS phase of cleanup beyond Neville's initial activity fee payment of $46,636.38.[18] Neville appears to argue that the September 29, 1989 letter describing the activity fee program suggests that if Neville paid the activity fee, it would not be subject to cost recovery. Neville argues that its interpretation of the September 29, 1989 letter

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16. Neville appeared to argue in its briefs that its payment of the activity fee was a complete satisfaction of all liability for costs at the Neville site.

17. The Court considers the sufficiency of DTSC's documentation of its costs below.

18. As discussed above, Neville stated at the hearing on the present motion that it was only disputing costs associated with the RI/FS phase of the cleanup.

is supported by DTSC's own policy statements. In particular, Neville relies on DTSC Management Memo 91-1, which states that "[a]lthough current law (H & SC 25360) continues to provide authority for full cost recovery after giving credit for any activity fees paid, it continues to be the Department's policy . . . to only collect direct program expenditures . . . beyond activity fees in cases where the responsible parties are being cooperative."[19] Byrne Decl., Ex. I. In light of this policy, Neville argues that DTSC's subsequent decision to pursue full cost recovery was arbitrary and capricious. DTSC responds that although DTSC Management Memo 91-1 states a policy of not pursuing full cost recovery from cooperating responsible parties, it also clearly explains that DTSC has the statutory authority, pursuant to Section 25360, to pursue full cost recovery if it chooses to do so. DTSC argues that its reference to its authority pursuant to Section 25360 operates, in effect, as a reservation of rights, and its subsequent decision to pursue full cost recovery is therefore not arbitrary and capricious.

At the hearing on the present motions, Neville argued that it would be inequitable to allow DTSC to change its policy retroactively and impose full cost recovery on Neville, where Neville paid the activity fee and went forward in reliance with the understanding that the fee would represent full payment of its obligation for a particular phase of cleanup. Neville argued that because the policy change was not expressly made retroactive, it could not be applied against Neville. This argument fails for several reasons. First, the

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19. The policy of only collecting direct program expenditures appears to imply that DTSC would not seek to recover oversight or indirect costs.

statute at issue provided for full cost recovery at all relevant times. Therefore, the policy change did not retroactively affect Neville's rights. Second, while DTSC's decision to pursue cost recovery may reflect an unexpected change in agency policy, it does not rise to the level of arbitrary and capricious conduct that could be considered to violate Neville's due process rights. As such, summary judgment must be granted in favor of DTSC on Neville's claim that DTSC acted in an arbitrary and capricious manner. Therefore, DTSC is entitled to recover all properly documented costs of the Neville site cleanup.

2. Sufficiency of DTSC's Evidence in Support of Claimed Costs

Neville also argues that some of DTSC's costs are arbitrary and capricious. First, Neville argues that DTSC appears to be overcharging for some of the work that it did. Second, Neville argues that DTSC has not presented sufficient documentation to support its indirect cost calculations and certain specific cost items. DTSC argues that the burden is on Neville to show inconsistency of costs with the NCP and that Neville has presented no evidence to support its allegations.

Neville's argument that DTSC overcharged for the work that it did has two components. First, Neville argues that DTSC has overcharged it to the extent that it seeks to recover RI/FS costs in excess of the activity fee that Neville has already paid. As discussed above, the Court finds that this argument has no merit.

Second, Neville argues, based on a declaration by its expert Peter Johnson, that DTSC "did not provide full and complete documentation to support its calculation of indirect cost rates." Johnson Decl. ¶10. Neville also argues that the summary compilations of activity which DTSC provided with its bills do not provide sufficient information to permit Neville to determine whether those costs are appropriate. In particular, Neville argues that the compilations: (1) fail to provide a specific description of the duties of particular employees who worked at the Neville site; and (2) describe travel expenses but fail to explain what necessitated the travel. Neville argues that the shortcomings of DTSC's records may be inconsistent with the NCP, which mandates that a party claiming costs pursuant to CERCLA collect and maintain documents sufficient to provide an accurate accounting of costs incurred. 40 C.F.R. § 300.160(a)(1). Neville requests that the Court deny or continue the hearing on this issue in order to conduct additional discovery.[20]

DTSC responds that it undertook to explain the calculation of its indirect cost rates in a letter to Neville in 1996, Declaration of Jeffrey J. Mahan ("Mahan Decl."), Ex. B at 55, and that the summary compilations of activity it submitted to Neville are amply supported by records that it maintains consistent with the NCP. DTSC further argues that if Neville questions the validity of DTSC's methodology for calculating costs, or the sufficiency of the evidence of particular expenses, it is Neville's burden to request the supporting documentation through discovery, and to point to specific ways in which the methodology or the evidence

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20. The current discovery cut-off in this case is April 2, 2002.

was inconsistent with the NCP. According to DTSC, mere conclusory statements that costs are unreasonable or inappropriate are not sufficient. *See United States v. Kramer,* 757 F.Supp. 397, 436 (D.N.J.1991) ("terms used by defendants such as 'proper' or 'improper,' 'remote, speculative, and contingent,' and 'unreasonable, duplicative, and not cost-effective,' do not state an appropriate challenge to the propriety of the government's costs and will be stricken"). In regard to Neville's request for additional discovery, DTSC argues that Neville has been on notice of the cost issues to which it now objects for several years, and has had ample opportunity to conduct discovery. According to DTSC, Neville did not serve any discovery in this case until February 27, 2002, two days after it filed its opposition, forty days after it was served with DTSC's summary judgment motion, and three months after the initial discovery cut-off. Nonetheless, the current discovery cut-off in this case is April 2, 2002. Therefore, the Court will take this issue under submission to allow Neville to conduct additional discovery. Neville may submit supplemental briefing on this issue within 20 days of the close of discovery. DTSC may respond to any such briefing within seven days of its being served on them.

D. *DTSC's Request For Interest and Attorneys' Fees*

As discussed above, the Court finds that DTSC may recover from Neville all properly documented cleanup costs. The Court also finds that DTSC is entitled to interest on those costs. However, because there are outstanding issues concerning documentation of costs, the Court will not grant summary judgment as to the amount of interest. For similar reasons, the Court declines to allow DTSC to recover its attorneys' fees at this time.

Appendix F

IV. CONCLUSION

For the reasons discussed above, plaintiff's motion for summary judgment is GRANTED in part as to defendant's liability under CERCLA. The remainder of plaintiff's motion, regarding its ability to recover costs, interest and attorneys' fees, will remain under submission pending additional discovery and briefing as described above.

IT IS SO ORDERED.

Dated: March 22, 2002

s/ Christina A. Snyder
CHRISTINA A. SNYDER
United States District Judge

APPENDIX G — TENTATIVE MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ISSUED MARCH 11, 2002

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE MINUTE ORDER

Case No.: CV 00-10205 CAS (Ex) March 11, 2002

Title: STATE OF CALIFORNIA v. NEVILLE CHEMICAL CO. et al.

PRESIDING: HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

Maynor Galvez, Deputy Clerk — none present, Court Reporter

PLAINTIFF COUNSEL PRESENT

DEFENDANT COUNSEL PRESENT

PROCEEDINGS: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT (filed October 22, 2001)

I. INTRODUCTION

This case is a cost-recovery action brought by plaintiff State of California on behalf of the Department of Toxic

Substances Control ("DTSC")[1] under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq*. DTSC seeks to recover costs associated with the cleanup of hazardous substances at a chemical manufacturing plant owned and operated by defendant Neville Chemical Company ("Neville"). The parties are now before the Court on DTSC's motion for summary judgment.

II. FACTS

1. Background

Neville is the owner and operator of a 3.5 acre industrial facility in Santa Fe Springs, California (the "site"). Compl. ¶ 6. From 1952 to approximately 1987, Neville manufactured chemical compounds for use in insecticides, solvents, metalworking lubricants and flame retardants at the site. *Id.* ¶ 8. Investigations at the site found that the soil and groundwater were significantly contaminated with hazardous substances from Neville's past handling, storage and disposal practices. *Id.* ¶ 11. In 1986, the Department of Toxic Substances Control ("DTSC")[2] ordered Neville to clean up the site pursuant to a Remedial Action Order ("RAO"). Declaration of Harlan Jeche in Support of Pl's. Mot. for Summ. Judg. ("Jeche Decl.") ¶ 9. The RAO required Neville

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1. The Court will refer to plaintiff as DTSC.

2. DTSC was a division of the California Department of Health Services ("DHS") until it became a separate department sometime in 1991. For ease of reference, the Court will utilize the term DTSC throughout.

to prepare a remedial investigation and feasibility study ("RI/FS"), and a remedial action proposal ("RAP"). in accordance with the National Contingency Plan ("NCP"). *Id.*, Ex. B at 174 (RI/FS), 181 (RAP). According to the terms of the RAO, Neville would then have to implement the RAP, and would be responsible for all operation and maintenance requirements of the RAP until the remediation goals of the RAP were met. *Id.*, Ex. B at 182. The RAO contains a provision for recovery of certain costs pursuant to state law. *Id.*, Ex. B at 188.

DTSC employees have allegedly spent thousands of hours since 1985, responding to releases and threatened releases of hazardous substances at the Neville facility, and overseeing Neville's own response measures. Jeche Decl. ¶ 10. The response measures undertaken at the Neville facility include: the removal of twenty one drums containing dichlorobenzenes, carbon tetrachloride, and chlorinated paraffins that had been illegally buried at the site; recontouring the soil and capping it with asphalt; installing a groundwater extraction-and-treatment system; and recording a deed restriction to prevent future uses of the site which would be harmful to humans and the environment. *Id.* ¶ 11. DTSC alleges that, as of September 30, 2001, its response costs for the Neville facility total $759,368.29, exclusive of interest and attorneys' fees.[3]

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3. This total includes the $46,636.38 activity fee which Neville has already paid to DTSC.

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2. Cost Recovery

In April 1985, DTSC filed suit against Neville in Superior Court for the County of Los Angeles. The relief sought in this action included the recovery of costs, pursuant to California Health and Safety Code ("Cal. H&SC") Section 25360. Declaration of Dennis J. Byrne in support of Neville's Opp'n to Mot. for Summ.. Judg. ("Byrne Decl."), Ex. A. Cal. H&SC § 25360 provides

> Any costs incurred and payable from the state account [the Hazardous Substance Account] shall be recovered by the department from the liable person or persons. In addition, such person or persons shall be liable to the department for administrative costs actually incurred, or five hundred dollars ($500), whichever is greater. The amount of cost determined pursuant to this section shall be recoverable in a civil action.

On December 10, 1986, DTSC issued the RAO to Neville, instructing it to conduct an RI/FS, and prepare and implement an RAP. Section III of the RAO stated a number of conclusions of law, which were based upon the application of California law. Byrne Decl., Ex. C at 16. Section 8.16 of the RAO, entitled "Cost Recovery," provided that

> Failure or refusal of (Neville) to comply with this Order may make (Neville) liable for any government costs incurred, including those payable from the Hazardous Substance Cleanup Fund for any remedial action at the site, as

> provided in Section 25360 of the Health and Safety Code and other applicable provisions of law. These costs include DHS's direct costs and DHS's administrative overhead costs in an amount equal to 10 percent of the reasonable cost actually incurred, or five hundred dollars ($500), whichever is greater. In addition, (Neville) may be liable for the costs of oversight by DHS of [Neville's] activities at the site as provided in Section 25360 of the Health and Safety Code. Respondents may also be liable to the Department for punitive damages up to three times the amount of any costs incurred by the state account pursuant to Section 25359 of the Health and Safety Code.

Id., Ex. C at 32.

On January 30, 1987, Angelo Bellomo, Chief of the Southern California Section of DTSC wrote to Neville informing it that the Neville facility had been listed on the Hazardous Substance Cleanup Bond Act Expenditure Plan as a site requiring assessment and cleanup action. *Id.*, Ex. D. Attached to the correspondence was a document entitled "Detailed Site Expenditure Plan Neville Chemical Company." In a section entitled "Projected Revenue Sources," the document lists Neville as a responsible party, and then states that "it appears at this time that it may be necessary to utilize bond funds to remediate this site. If bond funds are expended, the Department will undertake cost recovery action." *Id.* The document then sets forth estimated costs for DTSC's cleanup of the site, to be "funded from bond sale proceeds (to the extent that Federal Superfund or

responsible party funding in not available)." *Id.* The estimated costs are: $265,000 for site characterization, $60,000 for remedial action plan; and $1,110,000 for remedial action. *Id.*

In January 1987, Neville's Vice President and General Counsel, Thomas McKnight, declares that he attended a meeting with representatives of DTSC to discuss the RAO. According to McKnight:

> At this meeting DTSC threatened legal action against Neville pursuant to Sections 8.15 and 8.16 of the RAO if Neville failed to fully comply with the RAO. At this meeting, DTSC specifically represented to Neville that it would not be subject to cost recovery litigation if it agreed to voluntarily and fully comply with the RAO. DTSC indicated that they were prepared to perform the site assessment required under the RAO if Neville refused to cooperate.

Byrne Decl., Ex. E, McKnight Decl. ¶ 6.

In September 1987, DTSC approved the workplan Neville submitted for the remedial investigation of its property. McKnight Decl. ¶ 13. On February 19, 1988, DTSC dismissed its pending cost recovery claim against Neville in the Superior Court for the County of Los Angeles. Byrne Decl., Ex. G.

In 1989, California enacted Chapter 269 1989 Cal. Stats. Ch. 269, which amended portions of the Health and Safety

Code to restructure the way the state funds the cleanup of hazardous waste sites. Chapter 29 did not amend the cost recovery provisions of H&SC § 25360. However, pursuant to the new legislation DTSC initiated a program whereby it assessed an "activity fee" program intended to partially cover DTSC's oversight costs in circumstances where a responsible party such as Neville was conducting the actual investigation and remedial activity at a site. On September 29, 1989, DTSC sent Neville a letter explaining this program and assessing an initial activity fee of $46,636.38 for the RI/FS phase of the project. Jeche Decl., Ex. C. The letter also stated that "as each phase of the activity associated with a fee is completed at the site, a demand for the fee that is associated with the next phase of activity will be sent to you by the State Board [of Equalization]." *Id.*

In conjunction with the implementation of the Activity Fee program, DTSC issued policy statements to the effect that where a responsible party was complying with the RAO and conducting their own remediation efforts, the activity fee would be the full extent of cost recovery sought by DTSC. For example DTSC Management Memo 91-1 dated April 17, 1991, states:

> Chapter 269, Statutes of 1989, established an activity fee program which partially covers the Department's cost of overseeing hazardous substance release site investigation and cleanup activities. Under the fee legislation, responsible parties are generally liable for the Department's full cost for performing oversight activities prior to July 1, 1989 when the fee program took effect.

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> For oversight activities conducted after July 1, 1989, responsible parties are expected to pay the activity fees. Although current law (H&SC 25360) continues to provide authority for full cost recovery after giving credit for any activity fees paid, it continues to be the Department's policy (per OPP #90-1)[4] to only collect direct program expenditures (generally laboratory or contract expenditures) beyond activity fees in cases where the responsible parties are being cooperative.

Byrne Decl., Ex. H; *see also* Pollak Decl., Ex. B.

On April 27, 1992, DTSC issued Management Memo #91-9, in which it determined that its previously stated policy limiting cost recovery from cooperating responsible parties to the payment of their activity fees "is in conflict with the provisions of H&SC 25360 which essentially requires DTSC to attempt to recover all identified Hazardous Substances Account/bond expenditures." Byrne Decl., Ex. I. The memorandum then announced that "the policy reflected in OPP # 90-1 . . . regarding the acceptance of fees as full

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4. OPP # 90-1 refers to the Toxic Substances Control Program Cost Recovery Policy and Procedure manual dated March 1990. The manual suggest that cost recovery will be pursued against responsible parties who are conducting their own remediation activities only in extraordinary circumstances including, *inter alia*, violation of an RAO, failure to pay activity fees, unapproved delays in cleanup schedules caused by the responsible party, and submission of poor quality workplans and/or work products. See Declaration of Harrison Pollak in support of Pl's. Mot. for Summ. Judg. ("Pollak Decl."), Ex. B at 40.

compensation for oversight costs is rescinded immediately." *Id.* Finally, the memorandum stated that

> since there has been no hiatus in the cost recovery requirements of H&SC 25360, [responsible parties] will be liable for all costs identified, in excess of fees paid beginning July 1, 1989, which is the date of inception of the fee program. This revision provides for full cost recovery regardless of whether DTSC has determined that a [responsible party] is recalcitrant.

Id.

On September 21, 2000, DTSC filed a complaint seeking recovery of response costs already incurred by DTSC in conjunction with the cleanup of the Neville site, and a declaration that Neville would be responsible for any future DTSC response costs incurred at the Neville site.

II. LEGAL STANDARDS

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed. R. Civ. P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990). *See also Celotex Corp.*, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. *See also Abromson v. American Pacific Corp.*, 119 F.3d 898, 902 (9th Cir. 1997).

In light of the facts presented by the *nonmoving party*, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn*, 809 F.2d 626, 631 & n.3 (9th Cir. 1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir. 1997) . Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita*, 475 U.S. at 587.

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III. DISCUSSION

A. *Prima Facie* Liability Under CERCLA

To establish a *prima facie* case for liability under CERCLA, DTSC has to prove: (1) the site is a "facility"; (2) a "release" or "threatened release" of a hazardous substance occurred; (3) DTSC incurred costs in responding to the release or threatened release; and (4) the defendant falls within one of the four classes of responsible persons defined by the statute. 42 U.S.C. § 9607(a); *United States v. Chapman*, 146 F.3d 1166, 1169 (9th Cir. 1998). Once DTSC has established a *prima facie* case, the burden shifts to Neville to prove that DTSC's response action was inconsistent with the NCP, *id.*, or to assert affirmative defenses.

DTSC argues that it has made out its *prima facie* case for Neville's liability on undisputed evidence. CERCLA defines a "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. . . . " 42 U.S. C . § 9601(9). DTSC argues, and Neville does not deny, that CERCLA-defined hazardous substances, including dichlorobenzenes, polychlorinated debenzodioxins, polychlorinated dibenzofurans, chloroform, copper, zinc, and lead, have been detected at the Neville site. *See* 40 C.F.R., Part 302.4 (designation of CERCLA hazardous substances); Jeche Decl. ¶ 17 (describing substances found at the Neville site). Therefore, it is undisputed that the Neville site is a "facility" as defined by CERCLA.

CERCLA defines a "release" as ". . . any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting,

escaping, leaching, dumping or disposing into the *environment. . . .*" 42 U.S.C. § 9601(22). Neville admits that there have been releases or threatened releases of hazardous substances into the environment from the Neville facility. Amended Answer, ¶¶ 6, 16. The RAP also confirms that hazardous substances were detected in the soil, groundwater, surface water, and air at the Neville site, and identifies potential sources of those releases. Jeche Decl. ¶¶ 7-8, Ex. A at 36. Thus, it is undisputed that there was a release of hazardous substances at the Neville facility.

The third element of CERCLA liability is that the party seeking to recover costs must have incurred them in response to the release of hazardous substances at a facility.[5] "Response" is defined as "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25). CERCLA defines these terms to include the cleanup or removal of released hazardous substances from the environment, actions taken in the event of the threat of release of hazardous substances, actions to monitor, assess and evaluate the release or threatened release of hazardous substances, the disposal of removed material, and actions consistent with a permanent remedy. 42 U.S.C. § 9601(23)-(24). Response costs recoverable under CERCLA include oversight costs incurred

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5. CERCLA holds responsible parties liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe *not inconsistent with the national contingency plan*." 42 U.S.C. § 9607(a)(4)(A) (emphasis added). However, "failure to comply with the NCP is not a defense to liability, but rather a factual issue affecting damages." *Washington State Dept. of Transportation v. Washington Natural Gas Co.* ("*WSDOT*"), 59 F.3d 793, 798 (9th Cir. 1995).

by a government agency in an effort to ensure that a site is being adequately investigated and remediated by responsible parties. *State of California v. Celtor Chemical Corp.*, 901 F. Supp. 1481, 1489-90 (N.D. Cal. 1995); *State of California v Snydergeneral Corp.* 876 F. Supp. 222, 224-35 (E.D. Cal. 1994). Recoverable response costs also include reasonable attorneys' fees for bringing cost-recovery litigation, as well as indirect costs, or overhead. *Chapman*, 146 F.3d at 1175 (attorneys' fees); *United States v. R.W. Meyer*, 889 F.2d 1497, 1503 (6th Cir. 1989) (indirect costs). DTSC contends, as discussed above, that its employees have spent thousands of hours since 1985 responding to the releases of hazardous substances at the Neville site. DTSC also contends that attorneys in the State Attorney General's Office have spent more than one thousand hours litigating the present case. Declaration of Laurie Pearlman ("Pearlman Decl.") ¶ 7, Pollak Decl. ¶ 5. In a response to an interrogatory, Neville conceded "that DTSC has incurred costs in overseeing the investigation and remediation of environmental contamination associated with the Neville site." Pearlman Decl., Ex. A at 30:3-4. Accordingly, DTSC has established the third element of CERCLA liability.[6]

The final element of liability under CERCLA is that Neville falls within one of the four classes of statutorily defined responsible parties. DTSC argues that Neville is liable under at least two of these categories as (1) "the owner and operator of a vessel or facility"; and (2) "any person

6. The Court will consider below both Neville's assertion that DTSC should be barred from recovering any costs associated with the Neville site, and its narrower challenge to the propriety and validity of some of the specific response costs put forward by DTSC.

[including corporations] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed[.]" 42 U.S.C. § 9607 (a)(1)-(2).[7] Nevile admits that it has owned at operated the Neville facility since 1952. Amended Answer ¶¶ 6, 9. It also admits that it owned and operated the facility at the time of the disposal of hazardous substances. *Id.* ¶ 16. Therefore, Neville is liable under CERCLA as a the owner and operator of the Neville facility.

In sum, DTSC has established the four elements of a *prima facie* case for CERCLA liability against Neville. The burden therefore shifts to Neville to refute its liability.

B. Defenses to Liability Under CERCLA

Neville asserts six affirmative defenses to CERCLA liability in the Amended Answer. These defenses are: (1) failure to state recoverable CERCLA costs; (2) payment as satisfaction; (3) plaintiff's costs inconsistent with the NCP; (4) statute of limitations; (5) acts or omissions of third parties; intervening and superseding acts; and (6) no CERCLA hazardous substances. Amended Answer at 5-6.

Neville's first, third, fifth and sixth affirmative defenses are either inapposite to the issue of liability, or are not available on the facts of the record. Neville's first and third defenses challenge only whether particular costs incurred by

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7. The other two statutory categories refer to persons who arranged for disposal or treatment of hazardous substances at the facility, and to transporters of hazardous wastes to the facility. 42 U.S.C. § 9607(a)(3)-(4).

DTSC are recoverable, and are therefore not defenses to liability. *See WSDOT*, 59 F.3d at 798 ("failure to comply with the NCP is not a defense to liability, but rather a factual issue affecting damages"). Neville's fifth defense parallels the language of CERCLA's "innocent landowner" defense, which provides a statutory defense to liability where the release of hazardous substances was due to

> an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant.

42 U.S.C. § 9607(b)(3). In order to be able to assert this innocent landowner defense, the statute provides that a party must also demonstrate, by a preponderance of the evidence, that

> (a) [it] exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) [it] took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions

Id. The defense is unavailable to anyone who contributed, actively or passively, to the release of a hazardous substance at a site. *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 887 (9th Cir. 2001) (en banc). Neville has provided

no evidence of the involvement of a third party at the Neville site to whom the release of hazardous substances could be attributed. Furthermore, Neville has not presented evidence which, even when considered in the light most favorable to Neville, would establish that it did not contribute in some way to the release of hazardous substances at the Neville site. Therefore, Neville cannot prevail on its fifth defense. Neville's sixth defense is also not available here, because Neville has admitted that "there have been releases, or threatened releases, of hazardous substances into the environment" from the Neville facility. Amended Answer ¶ 6.[8]

Neville's second defense is based on its contention that actions taken by the parties limit DTSC's recovery to the $46,636.38 activity fee which Neville has already paid. Although this defense is entitled "payment as satisfaction" in Neville's amended answer, in its opposition to the present motion Neville recasts its defense as an argument that DTSC should be barred from recovery because (1) it acted in an arbitrary and capricious manner and (2) its claims are subject to equitable estoppel. DTSC contends that Neville's attempt to assert equitable defenses to liability fails as a matter of law because CERCLA limits available affirmative defenses to those enumerated in the statute. Congress imposed strict, but not absolute, liability under CERCLA. *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir. 1986). Statutorily defined responsible parties are liable for releases or threatened releases of a

8. The RAP for the site prepared by Neville also supplies indisputable evidence of the presence of hazardous substances at the Neville facility. *See* Jeche Decl., Ex. A at 35-49.

hazardous substance "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in [42 U.S.C. § 9607 (b)]." 42 U.S.C. § 9607(a). The affirmative defenses set forth in 42 U.S.C. § 9607 (b) are that the release of a hazardous substance was "caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party [subject to the qualifications discussed above]; or (4) any combination of the foregoing. . . ." The Ninth Circuit has concluded that these statutory affirmative defenses are intended to be exclusive. *See Levin Metals*, 799 F.2d at 1317 ("in order to state a claim for a declaration of nonliability, the declaratory judgment plaintiff *must* base its claim of nonliability on one or more of [42 U.S.C. § 9607(b)'s] statutory affirmative defenses") (emphasis added); *see also United States v. Shell Oil Co.*, 1992 WL 144296, *2 (C.D. Cal. 1992) ("this Court must conclude that for the purposes of (liability under § 9607(a)) of CERCLA, only the enumerated defenses will be recognized"). Other courts have-specifically held that equitable defenses cannot be used to preclude liability under § 9607(a) of CERCLA. *See Shell Oil*, 1992 WL 144296 at *8 (defendant's asserted equitable defenses of estoppel, waiver, laches, and unclean hands must be stricken because the language of § 9607(a), which provides for CERCLA liability "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)," clearly demonstrates that CERCLA's enumerated affirmative defenses are exclusive); *United States v. Stringfellow*, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987) (accord). Accordingly, the Court finds that Neville's second defense to CERCLA liability, construed as a claim of equitable

estoppel, is unavailable because it is not one of the affirmative defenses enumerated in 42 U.S.C. § 9607(b).[9]

Neville's fourth defense is that DTSC's cost recovery action is barred by the statute of limitations: Neville argues that DTSC's complaint is not timely because it was not filed "within 6 years after initiation of physical on-site construction of the remedial action" as required by statute. 42 U.S.C. § 9613(g)(2)(B). DTSC argues that this Court's earlier holding that Neville was not entitled to summary judgment on statute of limitations grounds, *see* December 17, 2001 Minute Order, establishes that the present action is not barred by the statute of limitations. However, the extent of the Court's holding in its December 17, 2001 Minute Order was that Neville failed to show a lack of genuine issues of material fact and was therefore not entitled to summary judgment in its favor. *Id.* at 8. As DTSC has offered no new arguments or evidence in support of its contention that the statute of limitations does not bar the present action, the Court finds that Neville's statue of limitations defense is still viable. For this reason, summary judgment on the issue of liability is not appropriate.

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9. Neville also attempts to raise DTSC's alleged arbitrary and capricious conduct as a defense to liability. However, this is a misapplication of the arbitrary and capricious conduct standard, which is employed to measure the consistency of particular cleanup actions with the NCP, and therefore goes to the question of what costs the government is entitled to recover as damages rather than to the question of liability. *See WSDOT*, 59 F.3d at 798 (holding that WSDOT was not entitled to recover response costs under CERCLA where its actions in connection with an environmental cleanup were inconsistent with the NCP to such a high degree as to be arbitrary and capricious, but also stating that "failure to comply with the NCP is not a defense to liability, but rather a factual issue affecting damages").

C. Inconsistency with the NCP

DTSC has established a *prima facie* case of CERCLA liability against Neville. Therefore, assuming *arguendo* that DTSC can establish that its claims are not barred by the statute of limitations, it is entitled to recover all response costs which are not inconsistent with the NCP. Response actions undertaken by a federal or state government entity, or an Indian tribe, are presumed to be consistent with the NCP. *WSDOT*, 59 F.3d at 799-800. Thus, when a governmental body such as DTSC seeks to recover its costs, it is the defendant's burden to prove that a particular government action is inconsistent with the NCP in order to preclude the government from recovering the costs of taking that action. *Id.* at 800. In order meet this burden of proof, the defendant must show that the government's particular action was arbitrary and capricious. *Id.* at 803; 42 U.S.C. § 9613(j)(2). It is the government's response actions, and not the cost of such actions, that are analyzed for compliance with the NCP. "[T]he NCP regulates choice of response actions, not costs. Costs by themselves cannot be inconsistent with the NCP." *United States v. Hardage*, 9832 F.2d 1436, 1443 (10th Cir. 1992).[10]

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10. The Tenth Circuit's reasoning in arriving at this conclusion bears repeating:

> CERCLA § 107(a)(4)(A) does not limit the government's recovery to "all reasonable costs;" rather, it permits the government to recover "all costs of removal or remedial action incurred . . . not inconsistent with the [NCP]."

(Cont'd)

Here, Neville argues that DTSC's actions are inconsistent with the NCP in two ways. First, as discussed above, Neville argues that DTSC acted in an arbitrary and capricious manner when it allegedly represented that it would not seek cost recovery against Neville unless Neville failed to comply with the RAO, but later sought cost recovery in spite of Neville's compliance. Second, Neville argues that DTSC has offered insufficient evidence to support the recovery of some of its claimed costs. The Court will consider each of these arguments below.

1. DTSC's Alleged Representations That It Would Not Seek Cost Recovery.

Neville argues that certain statements and actions by DTSC constituted representations that DTSC would not seek cost recovery from Neville so long as Neville conformed with its RAO. Neville further argues that these representations render DTSC's decision to pursue full cost recovery in spite

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(Cont'd)

> CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (emphasis added). The NCP regulates choice of response actions, not costs. *See* 40 C.F.R. §§ 300.65, 300.68 (1989). Costs, by themselves, cannot be inconsistent with the NCP. Only response actions -- i.e., removal or remedial actions -- can be inconsistent with the NCP, which can be demonstrated by a showing that the government's choice of response action was arbitrary and capricious.

Hardage, 982 F.2d at 1443.

of Neville's compliance with the RAO arbitrary and capricious.[11] In particular, Neville argues that:

> (1) the record demonstrates that DTSC offered to dismiss existing cost recovery actions, and to forego future cost recovery actions, in exchange for Neville's voluntary compliance with the RAO, including Neville's commitment to remediate the Neville site, and Neville detrimentally relied on that offer;
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> (2) Neville's payment of the activity fee assessed by DTSC was, pursuant to DTSC's own policy at that time, a full satisfaction of Neville's obligation to pay remediation costs for the Neville site; and
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> (3) DTSC's later policy change, which resulted in the retroactive imposition of full cost recovery on Neville, was arbitrary and capricious.

DTSC argues that, even if it acted in the way that Neville describes, these actions are irrelevant to the question of whether DTSC has complied with the NCP. The NCP "provide[s] the organizational structure and procedures for preparing for and responding to . . . releases of hazardous

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11. Many of Neville's arguments are phrased in terms of equitable estoppel -- i.e. that DTSC should be equitably estopped from pursuing cost recovery because of its alleged representations that it would not do so. However, given the standard by which compliance with the NCP is judged, for present purposes the Court will construe these arguments as arguments that DTSC acted in an arbitrary and capricious manner.

substances." *WSDOT* 59 F.3d at 799 (quoting 40 C.F.R. § 300.1). It "identifies methods for investigating the environmental and health problems resulting from a release or threatened release and criteria for determining the appropriate extent of response activities." *Id.* (quoting *Matter of Bell Petroleum Servs.*, 3 F.3d 889, 894 (5th Cir. 1993)). The NCP does not set forth particular procedures for governmental agencies to follow in pursuing cost recovery. According to DTSC, a valid challenge founded on inconsistency with the NCP must be based on allegations that the investigations and response actions undertaken by DTSC at the Neville site were somehow improper. DTSC argues that Neville alleges no such impropriety, but instead seeks to question DTSC's conduct in regard to its recovery of costs. According to DTSC, this conduct does not bear on the question of DTSC's compliance with the NCP.

In support of its argument that DTSC's conduct in regard to cost recovery was arbitrary and capricious and thus inconsistent with the NCP, Neville relies on two decisions in a single case, *Louisiana-Pacific Corp. v. Beazer Materials & Servs., Inc.*, 811 F. Supp. 1421 (E.D. Cal. 1993) ("*LP I*"); 842 F. Supp. 1243 (E.D. Cal. 1994) ("*LP II*"). In LP I, the court suggested that the United States Environmental Protection Agency ("EPA") might have acted in-an arbitrary and capricious manner by duplicating a private party's remedial investigation of a site. In *LP II*, the same court found that summary judgment as to Louisiana Pacific's ("LP's") liability for particular costs was inappropriate because some of the EPA's alleged duplicative actions may have been in retaliation for LP's refusal to sign a consent decree, and therefore were potentially a violation of LP's constitutional rights.

DTSC argues that these cases are inapplicable to the present situation because Neville has not argued, let alone produced evidence, that DTSC pursued any action, such as the duplicative investigation in *LP I*, which created additional or unnecessary costs. Furthermore, according to DTSC, Neville has made no allegation which raises constitutional questions such as the ones posed by the EPA's alleged retaliation in *LP II*. In addition, DTSC further argues that even if the Court assumes that the conduct alleged by Neville creates a claim for inconsistency with the NCP, Neville has not raised triable issues of fact that DTSC's conduct in regard to cost recovery was arbitrary and capricious. The gravamen of Neville's claim of arbitrary and capricious conduct is that DTSC's actions and policies misled Neville into believing that it would not be held liable for additional response costs if it complied with the RAO and paid the activity fee.[12] DTSC argues that the record shows that it did no such thing.

Neville argues that DTSC repeatedly represented that it would not pursue cost recovery actions unless Neville failed to comply with the RAO. DTSC responds that the statements offered by Neville merely demonstrate that it was DTSC's policy to allow responsible parties to conduct cleanup efforts at their own expense under DTSC supervision and oversight, as opposed to DTSC conducting the entire cleanup itself and subsequently seeking cost recovery from the responsible party for the whole cost of that cleanup. According to DTSC, it never suggested to Neville that Neville was not liable for DTSC's oversight costs. The Court will consider each of DTSC's alleged representations below.

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12. This conduct also forms the basis for Neville's defense of equitable estoppel.

First, Neville argues that the RAO's statement that Neville may be liable for DTSC's "direct costs and . . . administrative overhead costs," if it does not comply with the RAO, Byrne Decl., Ex. C at 32, implies that Neville would not be liable for cost recovery in the event it complied with the RAO. However, DTSC argues that it did not waive the right to pursue recovery of its oversight costs since the RAO goes on to state that Neville "may be liable for the costs of oversight" regardless of compliance with the RAO. *Id.* Neville also argues that at a January 1987 meeting, DTSC allegedly represented to Neville's General Counsel that it would not be subject to cost-recovery litigation if it "voluntarily and fully compl[ied] with the RAO." McKnight Decl. ¶ 6. Again, DTSC responds that the context of these discussions, which included DTSC's statement that it was "prepared to perform the site assessment required under the RAO if Neville refused to cooperate," *id.*, shows that DTSC's promise to forego cost recovery applied only to costs that it would have incurred if it had been forced to assume complete responsibility for the cleanup of the site due to Neville's noncompliance with the RAO. DTSC further argues that no evidence has been produced that the parties discussed whether DTSC would seek to recover its oversight costs in the event Neville complied with the RAO.

A similar argument is made by the parties with respect to the January 30, 1987 letter of Angelo Bellomo. Neville argues that Bellomo's statement -- "[I]t appears at this time that it may be necessary to utilize bond funds to remediate this site. If bond funds are expended, the Department will undertake cost recovery action." -- implies that DTSC would not pursue cost recovery if Neville complied with the RAO.

DTSC, by contrast, argues that the context of Bellomo's statement is clearly one in which DTSC may be forced to step in and conduct actual remediation of the site, rather than merely overseeing Neville's efforts. Once again, DTSC argues that there is no evidence in Bellomo's statements that DTSC is waiving the-right to recover its oversight costs.

Neville argues that, given the foregoing communications, the agreement between Neville and DTSC that Neville would proceed with the cleanup itself, as embodied in the workplan for remedial investigation prepared by Neville and approved by DTSC, cōnstituted a "deal" that Neville would comply with the RAO and DTSC would forego future cost recovery. Neville argues that DTSC's dismissal of its then existing cost recovery claims in state court is further evidence of that deal. DTSC responds that by approving Neville's workplan, all it did was provisionally agree to let Neville conduct the cleanup, thereby avoiding the necessity of having to undertake the cleanup itself, and the direct costs that it would have incurred had it been obliged to do so. According to DTSC, its dismissal of the complaint merely acknowledged that it would not be incurring the aforesaid direct Costs.[13] Thus, DTSC argues, neither its approval of the workplan, nor its dismissal of its state court cost recovery claim, demonstrates that it did not intend to recover its oversight costs at some future point.

Neville also points to DTSC's actions and policies concerning the assessment of an activity fee as evidence of arbitrary and capricious conduct. Neville argues that DTSC represented that as long as Neville complied with the RAO,

13. DTSC also notes that the complaint was dismissed without prejudice.

DTSC would not pursue cost recovery beyond Neville's initial activity fee payment of $46,636.38. In particular, Neville relies on the statement in DTSC Management Memo 91-1 that "[a]lthough current law (H&SC 25360) continues to provide authority for full cost recovery after giving credit for any/activity fees paid, it continues to be the Department's policy to only collect direct program expenditures beyond activity fees in cases where the responsible parties are being cooperative." Byrne Decl., Ex. I. Neville argues that DTSC's subsequent decision to pursue full cost recovery is arbitrary and capricious in light of this policy statement. DTSC responds that although DTSC Management Memo 91-1 states a policy of not pursuing full cost recovery against cooperating responsible parties, it also clearly explains that DTSC has the authority, pursuant to H&SC § 25360, to pursue full cost recovery if it chooses to do so. DTSC argues that its reference to its authority pursuant to H&SC § 25360 operates, in effect, as a reservation of rights, and its subsequent decision to pursue full cost recovery is therefore not arbitrary and capricious.[14]

After examining the record, the Court finds that there are questions of fact as to the precise representations made by DTSC to Neville. Nonetheless, given DTSC's argument

14. DTSC also argues that the activity fee paid by Neville related only to the RI/FS phase of cleanup, and that Neville itself acknowledges that it "understood . . . that Neville could expect an additional Activity Fee to be assigned for subsequent phases of work. . . ." McKnight Decl. 1 16. DTSC therefore argues that even if its change in policy regarding the activity fee is considered arbitrary and capricious, it would only be barred from recovering its costs for the RI/FS phase of cleanup, and Neville would still be liable for all its remaining costs.

that its actions, however construed, are not inconsistent with the NCP, the Court will hear argument on the following questions:

> (1) Did DTSC act in an arbitrary and capricious manner in determining to pursue full cost recovery after Neville voluntarily complied with the RAO, if it previously represented that it would not do do?
>
> (2) Did Neville's payment of the activity fee to DTSC constitute a full payment and satisfaction; if DTSC's own policy at the time of the payment was to not seek further cost recovery beyond the activity fee from cooperating responsible parties?
>
> (3) To the extent that Neville relied on DTSC's earlier policy of not seeking full cost recovery from cooperating responsible parties, was DTSC's later policy, which retroactively sought full cost recovery from Neville, arbitrary and capricious?

2. Sufficiency of DTSC's Evidence in Support of Claimed Costs

Neville also argues that some of DTSC's costs are arbitrary and capricious. First, Neville argues that DTSC appears to be overcharging for some of the work that it did. Second, Neville argues that DTSC has not presented sufficient documentation to support its indirect cost calculations and certain specific cost items. DTSC argues that the burden is on Neville to show inconsistency of its

costs with the NCP and that Neville has presented no evidence to support its allegations.

Neville's argument that DTSC overcharged for the work that it did has two components. First, Neville argues that DTSC has overcharged it to the extent that it seeks to recover RI/FS costs in excess of the $46,636 activity fee that Neville has already paid. As discussed above, the Court has not yet reaches a conclusion as to this argument.

Second, Neville argues, based on a declaration by its expert Peter Johnson, that DTSC "did not provide full and complete documentation to support its calculation of indirect cost rates." Johnson Decl. ¶ 10. Neville also argues that the summary compilations of activity which Neville provided with its bills do not provide sufficient information to permit Neville to determine whether those costs are appropriate. In particular, Neville argues that the compilations (1) fail to provide a specific description of the duties of particular employees who worked at the Neville site, and (2) describe travel expenses but fail to explain what necessitated the travel. Neville argues that the shortcomings in DTSC's records are potentially in violation of the NCP, which mandates that a party claiming costs pursuant to CERCLA collect and maintain documents sufficient to provide an accurate accounting of costs incurred. 40 C.F.R. § 300.160(a)(1). Neville requests that the Court deny or continue the hearing on this issue in order to conduct additional discovery.[15] In response, DTSC argues that it explained the calculation of its indirect cost rates in a letter

15. The current discovery cut-off in this case is April 2, 2002.

to Neville in 1996, Declaration of Jeffrey J. Mahan ("Mahan Decl."), Ex. B at 55, and that the summary compilations of activity it submitted to Neville are amply supported by records that it *maintains consistent* with the NCP. DTSC further argues that if Neville questions the validity of DTSC's methodology for calculating costs, or the sufficiency of the evidence of particular expenses, it is Neville's burden to request the supporting documentation through discovery, and to point to specific ways in which the methodology or the evidence was inconsistent with the NCP. According to DTSC, mere conclusory statements that costs are unreasonable or inappropriate are not sufficient. *See United States v. Kramer*, 757 F. Supp. 397, 436 (D.N.J. 1991) ("terms used by defendants such as 'proper' or 'improper,' 'remote, speculative, and contingent,' and 'unreasonable, duplicative, and not cost-effective,' do not state an appropriate challenge to the propriety of the government's costs and will be stricken"). In regard to Neville's request for additional discovery, DTSC argues that Neville has been on notice of the cost issues to which it now objects for several years, and has had ample opportunity to conduct discovery. According to DTSC, Neville did not serve any discovery in this case until February 27, 2002, two days after it filed its opposition, forty days after it was served with DTSC's summary judgment motion, and three months after the initial discovery cutoff. Nonetheless, the current discovery cut-off in this case is April 2, 2002. Therefore, the Court will take this issue under submission to allow Neville to conduct additional discovery. Neville may submit supplemental briefing on this issue within 20 days of the close of discovery. DTSC may respond to any such briefing within seven days of its being served on them.

D. DTSC's Request For Interest, Attorneys' Fees and Declaratory Relief

Because the Court finds that summary judgment is not appropriate, it declines to award DTSC interest or attorneys' fees, or to issue a declaration that Neville is liable for DTSC's future response costs.

IV. CONCLUSION

For the reasons discussed above, plaintiff's motion for summary judgment is DENIED.

IT IS SO ORDERED.

APPENDIX H — MINUTE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ISSUED DECEMBER 18, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 00-10205 CAS (Ex)

December 18, 2001

STATE OF CALIFORNIA

v.

NEVILLE CHEMICAL CO. et al.

PRESIDING: HONORABLE CHRISTINA A. SNYDER
U.S. DISTRICT JUDGE

Maynor Galvez,
Deputy Clerk

none present,
Court Reporter

PLAINTIFF COUNSEL PRESENT
DEFENDANT COUNSEL PRESENT

PROCEEDINGS: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(filed October 22, 2001)

MINUTE ORDER

Appendix H

I. INTRODUCTION

This case is a cost-recovery action brought by plaintiff State of California under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607. The parties are now before the Court on a motion for summary judgment brought by defendant Neville Chemical Company ("NCC"). NCC argues that plaintiff did not timely file its complaint within CERCLA's six-year statute of limitations for actions to recover the cost of remedial activities. Specifically, NCC argues that its installation of groundwater treatment wells in April 1994, which took place more than six years before the complaint in this action was filed, constituted an initiation of remedial activities on its site. Plaintiff argues that it has timely filed because the ultimate nature of the remedial action was unknown until the final remediation plan for the site was finalized, sometime in 1995.

II. FACTS

NCC is the owner and operator of a 3.5 acre industrial facility in Santa Fe Springs, California (the "site"). Compl. ¶6. From 1952 to approximately 1987, NCC manufactured chemical compounds for use in insecticides, solvents, metal working lubricants and flame retardants at the site. *Id.* ¶8. Investigations at the site found that the soil and groundwater were significantly contaminated with hazardous substances from NCC's past handling, storage and disposal practices. *Id.* ¶11. In 1986, the California Department of Health Services ("DHS") ordered NCC to clean up the site pursuant to a Remedial Action Order ("RAO"). Amir Decl. ¶10, Ex. A.

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The RAO instructs NCC to prepare a remedial investigation ("RI"), a feasibility study ("FS"), and a remedial action proposal ("RAP"), all of which must be approved by DHS. *Id.*

NCC's preliminary RI findings confirmed that the soil and groundwater at the site were contaminated with hazardous substances. In a letter dated October 25, 1991, the Department of Toxic Substances Control ("DTSC")[1] instructed Neville to prepare a proposal for a Groundwater Removal Action ("GRA") as an expedited response to contamination pending completion of the RAP process. Amir Decl., Ex. E. The letter states in pertinent part:

> [Due to the findings of contamination], [t]he Department has determined that an expedited response, technically a [Groundwater] Removal Action . . . , consisting of extraction, treatment and proper disposal of groundwater, may be appropriate to limit damage to existing or potential public water supplies. . . . Proceeding immediately with plans to extract and treat groundwater should substantially expedite remediation of groundwater contamination and thereby limit damage to potential groundwater resources. This should result in a more timely and cost effective cleanup. . . . The proposed [G]RA should be consistent with a final cleanup strategy for groundwater as it may ultimately become the

1. DTSC took over authority for state environmental cleanup actions from DHS sometime in 1991.

> final remedy presented in the Remedial Action Plan.

Id. NCC submitted a proposal for the GRA on September 1, 1992. Byrne Decl., Ex. A. NCC's proposal stated that "[i]t is expected that this proposal when implemented will constitute the full groundwater remedy for this site," *id.* § 1-2, and that its objective was "[t]o design and implement an extraction well network that will serve as a final groundwater remedy." *Id.* § 3-3. The proposal encompassed three extraction wells by which groundwater would be brought to the surface of the site for treatment before being discharged into the sanitary sewer system. *Id.* §§ 3-0 *et seq.*. On January 22, 1993, DTSC wrote to NCC regarding the proposed GRA and advised them that:

> [t]he Department has determined that implementation of this proposal is warranted and prudent. The ground water extraction and treatment system is envisioned as part of the final remedial alternative, however, the Department may order the discontinuation of its use in the event that it is not effective or if it enhances the migration of contaminants from the site.

Jeche Decl., Ex. A. DTSC approved NCC's proposed GRA in April 1993, and NCC began installation of the three groundwater wells in April 1994.[2] Byrne Decl., Exs. E, F.

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2. NCC states that they "installed" the wells in April 1994, plaintiff states that NCC "began to excavate the wells" in April 1994. *See* Mot. for Summ. Judg. at 4; Opp'n at 5.

Appendix H

In May 1994, NCC submitted a draft FS. On June 9, 1994, DTSC sent a letter and attached comments on the draft FS to NCC. The letter noted that "[t]he department has never stated that the [GRA] is the final ground water remedy, [because it] has to be tested to determine the efficacy of the system." Jeche Decl., Ex. D. The attached comments on the draft instructed NCC to replace the word "will" with the word "may" in a sentence describing one of the removal action's objectives as being to design an extraction well that will serve as a final groundwater remedy because "the [GRA] was not identified as the final remedy." *Id.* On October 6, 1994, DTSC wrote to NCC complaining of its failure to begin construction of the "Groundwater Removal System."[3] *Id.*, Ex. E. DTSC noted that NCC "will need to compare several sample results [from the wells] to determine the effectiveness of the System. [NCC] will use the information to determine whether this or a modified System will be incorporated into the draft Remedial Action Plan." *Id.* In December 1994, NCC submitted a final FS. Amir Decl., Ex. I. In the FS, NCC discusses the feasibility of seven alternative groundwater remedial options. Some of these options utilize the extraction wells in the same way as that proposed in the GRA, others use the wells to pump air or nitrogen into the groundwater as part of an on-site treatment system, still others do not utilize the wells at all. *Id.* The FS concludes that only those options which utilize the wells in some way, and a standard no action option, are worthy of inclusion in the draft RAP. *Id.* On December 16, 1994, the DTSC approved the final FS.

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3. It is not apparent from the record whether DTSC was aware that the well installation had begun, on the one hand, or whether the wells were actually fully in place and (potentially) operational, on the other.

Amir Decl., Ex. B. On March 16, 1995, DTSC approved NCC's draft RAP. *Id.*, Ex. C. DTSC circulated the draft RAP for public review and comment during a thirty-day comment period, and held a public meeting concerning the draft RAP on April 5, 1995. *Id.* ¶ 15. On May 8, 1995, DTSC approved the final RAP. *Id.*, Ex. D. In December 1995, the wells at the NCC site began active operation. Byrne Decl., Ex. D. On September 21, 2000, plaintiff filed the instant action on behalf of the DTSC. On October 7, 2001, NCC filed the instant motion for summary judgment. On December 17, 2001, the Court heard oral argument on the instant motion and took the matter under submission.

II. LEGAL STANDARDS

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of identifying relevant portions of the record that demonstrate the absence of a fact or facts necessary for one or more essential elements of each cause of action upon which the moving party seeks judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

If the moving party has sustained its burden, the nonmoving party must then identify specific facts, drawn from materials on file, that demonstrate that there is a dispute as to material facts on the elements that the moving party has contested. *See* Fed.R.Civ.P. 56(c). The nonmoving party must not simply rely on the pleadings and must do more than make "conclusory allegations [in] an affidavit." *Lujan v.*

National Wildlife Fed'n, 497 U.S. 871, 888 (1990). *See also Celotex Corp.*, 477 U.S. at 324. Summary judgment must be granted for the moving party if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. *See also Abromson v. American Pacific Corp.*, 114 F.3d 898, 902 (9th Cir.1997).

In light of the facts presented by the nonmoving party, along with any undisputed facts, the Court must decide whether the moving party is entitled to judgment as a matter of law. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 & n. 3 (9th Cir.1987). When deciding a motion for summary judgment, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted); *Valley Nat'l Bank of Ariz. v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 (9th Cir.1997). Summary judgment for the moving party is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *See Matsushita*, 475 U.S. at 587.

III. DISCUSSION

CERCLA provides that a recovery action for the costs of remediation must be commenced "within 6 years after initiation of physical on-site construction of the remedial action. . . ." 42 U.S.C. § 9613(g)(2)(B). The complaint in this action was filed on September 21, 2000, and is therefore

barred by the statute of limitations if on-site construction of the remedial action was initiated before September 21, 1994. NCC argues that the complaint is barred because the extraction wells it began installing in April 1994, were the only response to groundwater contamination ever seriously contemplated for the site, and were incorporated into the final remediation plan. Plaintiff concedes that work on the wells commenced in April 1994, but argues that this was not the "initiation of physical on-site construction of the remedial action" because the remedial action did not exist at that time. According to plaintiff, an activity that occurs before a final remedy has been identified is not a remedial action, and the wells, which were initially installed as part of a removal action, did not officially become part of a remedial action until May 8, 1995, when the final RAP was approved. Alternatively, plaintiff argues that the wells did not become part of a remedial action until December 16, 1994, when DTSC approved NCC's final FS, because until then there was still doubt as to whether the wells would form any part of the final remediation plan.

The essential question in this case is whether the extraction wells formed part of a removal action or a remedial action prior to September 21, 1994. CERCLA defines attempts to clean up environmental contamination as either "removal" or "remedial" actions. A removal action is defined as

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous materials into the

> environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23). A remedial action is defined as

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

42 U.S.C. § 9601(24). The difficulty presented by these two definitions is that they both may cover the same activity. *See Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917, 926 (5th Cir.2000) ("the CERCLA definitions [of removal and remedial] are expansive enough that certain activities may well be covered by both"); *Public Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1182 (10th Cir.1999) ("Elements of either response action may overlap and semantics often obscure the actual nature of the cleanup performed."). This ambiguity is especially apparent in situations such as the present one where a cleanup alternative which arguably starts as a removal action undisputedly ends up as part of a remedial action.

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Advanced Micro Devices v. National Semiconductor Corporation, 38 F.Supp.2d 802, 812 (N.D.Cal.1999), provides some guidance. *Advanced Micro Devices* concerned a situation quite similar to the instant case. Extraction wells initially drilled by plaintiff at its facility in 1986 as part of an "interim remediation program" were eventually incorporated in September 1991, into the final remediation plan for the site. *Id.* at 806-07. A CERCLA cost recovery suit for contribution was filed in September 1997.[4] *Id.* at 807. The court considered whether the initial installation of the wells constituted a remedial action which would trigger CERCLA's six-year statute of limitations. Plaintiff argued that no remedial action could take place until a final remedial plan had been officially approved. *Id.* at 811. The court rejected that bright-line test in favor of an analysis of the proximity of the action to the "disclosure of the final remedial design, which may occur prior to approval of the final remedial plan." *Id.* at 812; *see also State of California v. Hyampom Lumber Co.*, 903 F.Supp. 1389, 1393 (E.D.Cal.1995) (holding that a draft RAP constituted a final remedial design);[5] *Geraghty and Miller*, 234 F.3d at 927

4. CERCLA allows for suits for contribution between parties who are jointly responsible for cleanup costs.

5. *Hyampom Lumber* is source of the "final remedial design" test. Plaintiff in that case argued that legislative history which described § 9613(g)(2)(B)'s accrual point as "the commencement of physical on-site construction of the remedial action, *that is, after the RI/FS and after design of the remedy*" showed that Congress did not intend actions commenced before official approval of a remedial action plan to be considered remedial actions. *Hyampom Lumber*, 903 F.Supp. at 1393 (quoting U.S.C.C.A.N. 2835, 3044) (emphasis (Cont'd)

(actions cannot be classified as remedial when "Louisiana Department [of Environmental Quality] had yet to issue its final decision, and only that decision will define the ultimate remedial strategy"). The *Advanced Micro Devices* court concluded that the extraction wells could not have been "remedial" in 1986 because there was no final remedial design until 1991. *Id.* The court observed that remedial design could not be considered final while "different alternatives for final remedial action were still being evaluated." *Id.* at 812. The court addressed the fact that the extraction wells were adopted without modification as part of the final groundwater treatment system by noting "the system could not, upon its installation, have 'played a critical role in the implementation of the permanent remedy,' because the permanent remedy was not determined until four years later . . . The fact that the extraction activities ultimately did not turn out to be 'short-term,' because they were implemented in the final remedy four years later, cannot now be considered in hindsight." *Id.* at 813 (citing *Hyampom Lumber,* 903 F.Supp. at 1393).

In the instant case, NCC argues that the "remedial" action was initiated in April 1994, when it began construction of the extraction wells. NCC argues that the GRA, approved in April 1993, is identical in all respects to the final remediation plan. Additionally, NCC alleges that DTSC never considered a more aggressive strategy for addressing groundwater

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(Cont'd)
in original). The court rejected plaintiff's argument because the legislative history referred to the design of the remedy rather than the remedial plan. *Id.*

contamination on the site than that embodied in the GRA.[6] Reply at 6. Plaintiff argues that although the final RAP for groundwater is essentially the same as the GRA, there was no guarantee of that outcome in April 1994. Other options for the treatment of groundwater were evaluated, and the remediation design was finalized only after the draft RAP was evaluated and the public was given the opportunity to comment on it, or at the earliest when DTSC approved NCC's draft FS, which narrowed the groundwater remediation options to those which employed the extraction wells and no action. Here, plaintiff has presented admissible evidence that diverse solutions to the groundwater contamination problem were still being discussed in NCC's draft FS in December 1994, and that the parties were still considering changes in the groundwater plan up until the RAP was finalized in May 1995.[7] Plaintiff has also offered evidence

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6. NCC also maintains that plaintiff's use of the term "removal" in its pre-RAP documentation of the groundwater proposals is not derived from CERCLA, but rather from California law's requirement that a "remedial" action could only be initiated after the drafting of a remedial action plan. Response at 8. In other words, according to NCC, plaintiff initiated an action which was remedial for CERCLA purposes but could not be called remedial due to California law's limitation on the use of that term. However, DTSC's repeated admonitions to NCC that the GRA should be considered a tentative solution to the groundwater problem, pending further monitoring and approval of the RAP, suggests that they did not consider the removal and remedial actions to be one and the same. At the very least a material question of fact exists on this issue.

7. Plaintiff also appears to argue that although the remediation design was finalized in the RAP, it was still not "final" because it

(Cont'd)

that the DTSC, at least as late as its October 6, 1994 letter to NCC, was insisting that further sampling and monitoring was necessary before the wells proposed in the GRA could be considered the final remedial solution for groundwater at the site. Therefore, viewing the evidence in the light most favorable to plaintiff, the nonmoving party, the Court finds that the final remedial design was not in place, and the statute of limitations had not yet begun to accrue, on September 21, 1994.

IV. CONCLUSION

For the reasons discussed above, defendant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

(Cont'd)
was subject to revision based on the results of testing from the extraction wells, which were not yet operational at the time the RAP was approved. Because the Court denies NCC's motion for summary judgment on other grounds, it does not reach this argument.

APPENDIX I — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED MARCH 31, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-56506

D.C. No. CV-00-10205-CAS
Central District of California,
Los Angeles

STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,

Plaintiff - Appellee,

v.

NEVILLE CHEMICAL COMPANY, a corporation,

Defendant - Appellant.

ORDER

Before: PREGERSON, FERNANDEZ, and BERZON, Circuit Judges.

The panel has unanimously voted to deny appellants' petition for rehearing. Judge Pregerson and Judge Berzon have voted to deny the petition for rehearing en banc. Judge Fernandez recommends denial of the petition for rehearing en banc.

Appendix I

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX J — RELEVANT STATUTE
42 USCS § 9601 (2004)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

42 USCS § 9601 (2004)

§ 9601. Definitions

For purposes of this title [42 USCS §§ 9601 et seq.]—

* * *

[23] The terms "remove or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 104(b) of this Act [42 USCS § 9604(b)], and any emergency assistance which may be provided under the Disaster Relief Act and Emergency Assistance Act.

Appendix J

(24) The terms "remedy" or "remedial action" means [mean] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

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APPENDIX K — RELEVANT STATUTE
42 USCS § 9607 (2004)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

42 USCS § 9607 (2004)

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities,

incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 104(i) [*42 USCS § 9604*(i)].

* * *

(b) Defenses. There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

* * * *

APPENDIX L — RELEVANT STATUTE
42 USCS § 9613 (2004)

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 103. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY
HAZARDOUS SUBSTANCES RELEASES, LIABILITY, COMPENSATION

42 USCS § 9613 (2004)

§ 9613. Civil proceedings

* * *

(g) Period in which action may be brought.

* * *

(2) Actions for recovery of costs. An initial action for recovery of the costs referred to in section 107 [*42 USCS § 9607*] must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) [*42 USCS § 9604*(c)(1)(C)] for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs

incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 107 [*42 USCS § 9607*] for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 107 [*42 USCS § 9607*] for recovery of costs at any time after such costs have been incurred.

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